EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 10279

United States Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,

Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

ROTARY COLORPRINT. 590 FOLSOM ST., SAN FRANCISCO

No. 10279

United States
Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,

Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho
Southern Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index Page

Index Page

Index

Index Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

GEORGE DONART
Weiser, Idaho
FREDERICK P. CRANSTON
409 Equitable Building
Denver, Colorado,
Attorneys for Appellant.

RICHARDS & HAGA
Boise, Idaho,
Attorneys for Appellee. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Idaho,
Southern Division

No. 2152

THE STRAIGHT SIDE BASKET CORPORATION, a corporation,

Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,

Defendant.

COMPLAINT

The Straight Side Basket Corporation, plaintiff in the above entitled action, complains of Cummer-Graham Company, defendant in said action, and for cause of complaint alleges:

I.

Jurisdiction is founded on diversity of citizenship and amount. Plaintiff is a corporation organized under the laws of the State of Michigan and citizen and resident of said state, and defendant is a corporation incorporated under the laws of the State of Texas and is a citizen and resident of said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3000.00) Dollars.

II.

Plaintiff now is and during all the times hereinafter mentioned was the sole owner of patents and

applications for patents covering patented methods, processes, machines and machine attachments for the manufacture of what is commonly known as "Straight Side Broken and/or Bent Bottom Baskets", and other Straight Side Baskets.

III.

That from time to time for more than ten years last past plaintiff, as the owner of said patent rights, entered into [3] contracts with the defendant and with the Veneer Products Company, a Colorado corporation, which is and was wholly owned, dominated and controlled by the defendant, under and by the terms of which contracts the defendant and its said subsidiary were licensed and authorized to use the said patents and applications for patents covering patented methods, processes, machines and machine attachments, and were furnished with such machines and attachments for the manufacture of such baskets upon the payment to the plaintiff of certain royalties as stipulated and set forth in said contracts. That said contracts further provided that the licensee therein named should furnish reports showing the gross sales of all baskets produced under such license, and that the royalties should be paid on or before the 15th day of each calendar month upon all baskets shipped during the preceding calendar month, and that the licensee should report in writing to plaintiff at the end of each calendar month the amount of gross sales and the number of baskets shipped during said month.

IV.

That on or about the first day of October, 1941, the defendant reported to plaintiff that the accumulated and unpaid royalties due plaintiff from baskets manufactured, shipped and delivered by the defendant and its said wholly owned subsidiary aggregated Nine Thousand Eighty-seven Dollars and Twenty-six Cents ($9,087.26). That plaintiff has no information as to the amount of such royalties except the report so made by the defendant. That the defendant has refused and neglected, and still refuses and neglects, to pay the said royalties or any part thereof, all of which said royalties so remaining unpaid have accumulated, as plaintiff is informed and believes and so alleges the facts to be, since the first day of January, 1941. [4]

V.

That there is now due and owing from the defendant to the plaintiff the said sum of Nine Thousand Eighty-seven Dollars and Twenty-six Cents ($9087.26), with interest thereon at the rate of six per cent (6%) per annum from the date the various items comprising said sum should have been paid according to the terms of said agreements.

Wherefore, Plaintiff demands judgment against the said defendant for the said sum of Nine Thousand Eighty-seven Dollars and Twenty-six Cents ($9087.26), with interest at the rate of six per cent

(6%) per annum as aforesaid, and for his costs herein.

RICHARDS & HAGA
Attorneys for Plaintiff
Residence: Boise, Idaho
OLIVER O. HAGA
Of Counsel for Plaintiff

(Duly verified)

[Endorsed]: Filed Oct. 21, 1941. [5]

[Title of Court and Cause.]

SUMMONS

To the above named Defendant: Cummer-Graham Company, a corporation

You are hereby summoned and required to serve upon Richards & Haga and Oliver O. Haga, plaintiff's attorneys, whose address is Boise, Idaho, Idaho Building, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] W. D. McREYNOLDS
Clerk of Court.

Date: October 21st, 1941.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 30th. day of October 1941, I received the within summons and served same on the within named defendant, C. H. Kinney on October 30th, 1941 at Payette Idaho by showing him the original Summons and handing to him personally two copies of same. C. H. Kinney served as sales manager of defendant corporation, Cummer-Graham Co.

ED. M. BRYAN
United States Marshal.
By EARLE B. WILLIAMS
Deputy United States
Marshal.

Marshal's Fees

Travel ------	$4.64
Service -----	2.00
	6.64

[Endorsed]: Filed Nov. 5, 1941. [6]

[Title of Court and Cause.]

MOTION TO DISMISS

The defendant moves the Court as follows:

I.

To dismiss the action on the ground that it is in the wrong district because the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and it appears upon the face of the complaint that plaintiff is a corporation organized

under the laws of Michigan, and is a citizen and resident of said State; and it appears upon the face of the complaint that defendant is a corporation organized under the laws of Texas and is a citizen and resident of said State; and this action has not been brought in the district of the residence of either the plaintiff or defendant as required by U. S. Code, Title 28, Sec. 112, and the venue of this action has been improperly laid;

II.

To dismiss the action, or in lieu thereof to quash the service of summons, or quash the return of service of summons on the ground that the defendant is a corporation organized under the laws of Texas, and was not and is not subject to [7] service of process within the District of Idaho, and has not qualified to do business in Idaho, and at the time of service of summons was not engaged in doing business in Idaho, and is not now so engaged, and the defendant has not been properly served with process in this action; all of which more clearly appears in the affidavit of C. H. Kinney, hereto annexed as Exhibit A.

GEO. DONART
Residing at Weiser, Idaho.
FREDERICK P. CRANSTON
409 Equitable Building
Denver, Colorado
Attorneys for Defendant.

Defendant's Address: Paris, Texas
(Service Accepted)

[Endorsed]: Filed Nov. 17, 1941. [8]

EXHIBIT A (Attached to Motion To Dismiss)

[Title of Court and Cause.]

AFFIDAVIT OF C. H. KINNEY

State of Idaho
County of Payette—ss.

C. H. Kinney, being first duly sworn, deposes and says:

That he is the same identical C. H. Kinney upon whom the summons issued in the above entitled cause was served by the United States Marshal or Deputy United States Marshal by and under direction of the plaintiff;

That said summons was delivered to him at Payette, Idaho, on or about the 30th day of October, 1941;

That he is a resident and citizen of Paris, Texas; that he is not a cashier, secretary or managing or general agent of the defendant corporation and he is not an agent authorized by appointment or by law to receive service of process for and in behalf of said corporation, and that he has not been designated by the defendant corporation pursuant to the terms of any statute of the State of Idaho as an agent of said corporation upon whom service of process issued out of any Court may be made; [9]

That he is Western Sales Manager of the defendant corporation and represents said corporation with respect to sales of its materials in the State of Idaho and other western and southwestern states;

That he works under the direction of the officers

of said corporation and has no voice in the management or control of the affairs of said corporation;

That Cummer-Graham Company is a Texas corporation, and has not qualified to do business in the State of Idaho, and was not at the time the purported service of process upon him, nor at any other time engaged in business in Idaho, nor is it now engaged in business in Idaho; that it then maintained no office or place of business in the State of Idaho, nor does it now maintain, nor has it at any time maintained such office or place of business in Idaho; that all sales made by it to customers in the State of Idaho have been filled by shipment to said customers from points outside the State of Idaho, to-wit, in the State of Texas.

C. H. KINNEY

Subscribed and sworn to before me this 15th day of November, 1941.

[Seal] GEO. DONART

Notary Public, Residing at Weiser, Idaho.

My commission expires: 3-18-44. [10]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

State of Idaho
County of Ada—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says:

I.

That he now is and for many years last past has been an attorney for the plaintiff, The Straight Side Basket Corporation, and is engaged in the practice of law in the State of Idaho, and has his office in Boise, Idaho, and is a member of the firm of Richards & Haga; that he makes this affidavit for and on behalf of the above named plaintiff for the reason that plaintiff is a corporation incorporated under the laws of the State of Michigan and has its office and principal place of business at Benton Harbor, Michigan, and its officers reside in the State of Michigan, and none of its officers is now within the State of Idaho.

II.

That affiant has made diligent search and inquiry as to the extent and nature of defendant's business in the State of Idaho and the extent to which C. H. Kinney, on whom summons was served in this cause, represents and acts for said defendant in the State of Idaho and elsewhere; that based upon the information so obtained and which affiant verily believes

to be correct, this affiant [11] alleges the facts to be:

(a) That said C. H. Kinney now is and for many years last past has been the western sales-manager of the said defendant and as such sales-manager he has represented the defendant in all business transacted by said defendant in the State of Idaho, as hereinafter more particularly set forth; that said C. H. Kinney has his permanent residence in the City of Paris, State of Texas, which is the home office and headquarters of said defendant; that said defendant is the owner of a subsidiary corporation known as the Veneer Products Company, a Colorado corporation, also engaged in manufacturing baskets for the packing of fruit and vegetables, and said C. H. Kinney, acting for the defendant herein, is president of said Veneer Products Company, and as such transacts business for the defendant by selling in the name of said Veneer Products Company baskets manufactured by said corporation.

(b) That for many years last past the said defendant and the said Veneer Products Company have manufactured baskets under patents owned by plaintiff and under contracts with plaintiff, by the terms of which the said defendant and the said Veneer Products Company agreed to pay to plaintiff a certain amount for each and every basket manufactured; that a large amount of such baskets have been manufactured by the defendant, and to some extent also by said Veneer Products Company, and the baskets so manufactured by the defendant

under the patents owned by plaintiff, and on which the defendant has agreed to pay plaintiff a certain amount for each basket so manufactured, have been sold in the State of Idaho by or with the aid and assistance of said C. H. Kinney, as hereinafter set forth; that the amount of baskets so sold in the State of Idaho by said defendant, by or with the aid and assistance of said C. H. Kinney, have amounted to from $75,000.00 to $125,000.00, and upwards, per year for many years last past. [12]

(c) That the usual course of handling defendant's business in Idaho has been to have two distributors in southwestern Idaho through whom such baskets could be purchased by the growers and other dealers, but in order to promote the sale of baskets so manufactured by the defendant, said C. H. Kinney, as salesmanager, has for many years last past spent much of his time in the State of Idaho during the packing season or during the period when baskets are usually sold to or contracted for by the growers and dealers, and during such period has devoted himself to the selling of defendant's baskets and aiding and assisting defendant's distributors in selling or promoting the sale of such baskets; that the defendant shipped said baskets usually in car-load lots and it has been customary for defendant to consign such baskets to itself, and from the shipments so received in the State of Idaho, baskets have been delivered in the state to dealers and growers; again, defendant ships baskets to its distributors in the state, and if, at the

close of the packing season, there is any substantial amount of baskets unsold, they are stored in the State of Idaho by and for the account of the defendant and held at its cost and expense until the next packing season, when the baskets so stored and carried over from the preceding year are sold to growers or dealers or to defendant's distributors; that a substantial part of defendant's business as handled in the State of Idaho is not inter-state business, but is based on sales made in the State of Idaho, solicited or made by said C. H. Kinney in whole or in part, or with the aid of the distributors, and deliveries of baskets are made from stocks of the defendant in the State of Idaho.

(d) That said C. H. Kinney has, to all intents and purposes, full authority as to sales made in the State of Idaho, and as heretofore stated, he represents and has represented said defendant for many years last past in carrying on the sale of its baskets, not only in the State of Idaho but in other western states. [13]

III.

That the defendant has acquired a substantial amount of orchard property and other property in the State of Idaho in satisfaction of debts due it from dealers, distributors and growers, and while defendant is the owner thereof, the title thereto is held in the name or names of other parties because the defendant has failed to qualify as a foreign corporation under the laws of the State of Idaho, and by reason thereof cannot legally hold title to such property; that said C. H. Kinney manages and

supervises the handling of the orchard property so acquired and the caring for the orchards and the marketing of fruit from such orchards, and represents the defendant in such matters, and is the only representative or officer of the defendant who handles, manages or cares for defendant's property in the State of Idaho.

IV.

That the defendant does no business in the State of Michigan and has no property in said state on which plaintiff can levy execution or a writ of attachment or from which it can recover the amount due plaintiff from the defendant.

OLIVER O. HAGA

Subscribed and sworn to before me this 22nd day of January, 1942.

[Seal] CHAS. H. DARLING
Notary Public for Idaho
Residence: Boise, Idaho

(Affidavit of Service Attached)

[Endorsed]: Filed Jan. 27, 1942. [14]

[Title of Court and Cause.]

COUNTER-AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

State of Colorado
City and County of Denver—ss.

C. H. Kinney, being first duly sworn, deposes and says that the word "defendant" as used herein re-

fers to Cummer-Graham Company; that he now is and since 1938 has been Salesmanager for defendant, but he has not represented defendant in all business transacted by defendant in Idaho; that he is not, and has not been western salesmanager of defendant; that prior to November 1938 and after December 1934 he was Western Manager of Basket Sales Company, a Texas corporation.

That defendant has been represented in its business transactions in Idaho at various times by Arthur V. Kinney, Wallace Norton, J. C. DeShonge and J. A. McGill.

That affiant has not transacted business for defendant by selling in the name of the Veneer Products Company any baskets whatsoever.

That Veneer Products Company has not manufactured any baskets since 1934 except for defendant, Cummer-Graham Company, and has sold all baskets manufactured by it to Cummer-Graham Company in the State of Texas, and has made no sales and transacted no business in Idaho since 1934.

That the usual course of handling defendant's business in Idaho has been to make sales at wholesale to distributors in [15] Idaho through whom such distributors have made sales at retail to growers and other dealers.

That affiant has, since 1938, spent a maximum of two months per year in Idaho, and some years has spent less; that as Salesmanager, his territory covers twenty-six states of which Idaho is only one; that all of said sales to defendant's customers have

been shipped in carload lots from outside of Idaho; and when requested by the distributors to whom sales have been made, some baskets have been delivered in Idaho directly to the customers of said wholesale distributors, but the said sales have been made, and the accounts charged to said distributors and not to the customers of said distributors to whom deliveries have been made; and said distributors in making sales to their customers have at all times acted entirely in their own behalf, and not in behalf of or under the direction of defendant; that if at the close of the packing season any substantial amount of baskets have been unsold by defendant's distributors, they have been stored in Idaho by said distributors at the expense of the said distributors, and not by nor at the cost and expense of the defendant; that defendant has permitted payment of the accounts of said distributors represented by the unsold baskets to be postponed until the said distributors shall have disposed of said baskets through their own efforts, but that said baskets so stored or carried over have been at all times held and carried over by and at the cost of the wholesale distributor, and not by or at the cost of defendant, and all credit risks are assumed by the wholesale distributors; and taxes and insurance have been paid thereon by said wholesale distributors, and in the name of said wholesale distributors, and in some instances with loss payable clause to defendant as its interest may appear, and not by or in the name of defendant, all of which

has been done under the terms of consignment contracts with said wholesale distributors; that all of defendant's business handled in Idaho has been and is interstate business, and none of it has [16] been or is handled solely and entirely in the State of Idaho; and no baskets have at any time been delivered by defendant from stocks belonging to defendant in Idaho.

That affiant does not have nor does he hold himself out to have full authority for sales made in Idaho; that the policies, prices and terms are determined by the Board of Directors of defendant, which has never held any meeting in Idaho, and under whose instructions he acts at all times, and to which he refers any questions of policy departing from instructions theretofore given to him by said Board.

That except for indebtedness due to it, the defendant has not acquired and does not own a substantial or any amount of orchard property, or of any property, in Idaho, and has not acquired any such property in satisfaction of a debt or debts due it from dealers, distributors or growers, or from any other person, or for any other reason, nor does defendant own or cause the title thereof to be owned or held in the name or names of other parties for its benefit; that affiant does not and has not managed or supervised any orchard property in Idaho, nor has he managed or supervised the handling or the caring for the same, nor the marketing of fruit therefrom, nor does he, nor has he rep-

resented defendant in such matters, nor does defendant have any representative or officer who handles or manages or cares for any property in Idaho other than to make sales in interstate commerce as by affiant's affidavits herein admitted.

That defendant has ample property free and clear of all encumbrances in the State of Texas from which plaintiff may satisfy any judgment which it may obtain against defendant.

C. H. KINNEY

Subscribed and sworn to before me this 29th day of January, 1942. My commission expires December 16, 1942.

[Seal] MARGARET T. RICH
Notary Public

[Endorsed]: Filed Feb. 2, 1942. [17]

[Title of Court and Cause.]

MINUTES OF THE COURT OF FEBRUARY 2, 1942

This cause came on for hearing on the defendant's motion to dismiss the complaint. O. O. Haga, Esquire, appeared for the plaintiff and George Donart, Esquire, appeared for the defendant.

It was agreed by counsel that the plaintiff would amend the complaint to include the matters set forth in the affidavit of O. O. Haga and that thereupon the defendant would withdraw the affidavit of C. H.

Kinney filed on this date, all of which was approved by the Court, and it was so ordered.

Submission of the defendant's motion to dismiss the complaint as so amended was continued until after the deposition of the motion to quash service of summons. The Court granted the parties thirty days in which to prepare for the submission of said motion to quash by either affidavits or by depositions. [18]

[Title of Court and Cause.]

ORDER

On motion of attorneys for plaintiff, supported by affidavit of Oliver O. Haga, and good cause appearing therefor;

It Is Ordered That both parties to this cause may have to and including the 19th day of March in which to take depositions for use on the hearing of defendant's Motion to Quash the Service of Summons and Dismiss Plaintiff's Complaint.

Dated this 14th day of February, 1942.

CHARLES C. CAVANAH
District Judge

[Endorsed]: Filed Feb. 14, 1942. [19]

[Title of Court and Cause.]

AMENDED COMPLAINT

By leave of court first had and obtained, The Straight Side Basket Corporation, plaintiff in the above entitled action, files this, its amended complaint, against the defendant, Cummer-Graham Company, and alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Michigan and a citizen and resident of said state, and defendant is a corporation incorporated under the laws of the State of Texas and is a citizen and resident of said state but doing business in the State of Idaho, as hereinafter more particularly set forth; that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That plaintiff now is and during all the times hereinafter mentioned was the sole owner of certain patents and applications for patents covering patented methods, processes, machines and machine attachments for the manufacture of stave baskets for use in packing and marketing fruits and vegetables, including but not limited to a type of basket commonly known as the straight side, broken, and/or bent-bottom baskets and the S.I.B. (Stitched-in-Bottom) or ideal hamper baskets. [20]

III.

That from time to time for more than ten years last past, plaintiff, as the owner of said patent rights, entered into contracts with the defendant and with the Veneer Products Company, a Colorado corporation, which is owned by the defendant, Cummer-Graham Company, or by the principal stockholders thereof, and is wholly dominated and controlled by the defendant, Cummer-Graham Company, under and by the terms of which contract the defendant and its said subsidiary or affiliate, Veneer Products Company, were licensed and authorized to use the said patents and applications for patents covering patented methods, processes, machines and machine attachments, and the said defendant and its said subsidiary or affiliate corporation were furnished with such machines and attachments for the manufacture of such baskets under agreements providing for the payment to plaintiff of certain royalties stipulated and set forth in said contracts and computed upon and to be paid according to the number of baskets manufactured and sold by said defendant; that said contracts further provide that the licensee therein named should furnish reports showing the gross sales of all baskets produced under such licenses, and that the royalties to be paid under said contracts should be paid on or before the 15th day of each calendar month upon all baskets manufactured and shipped during the preceding calendar month, and that the licensee should report in writing to plaintiff at the end of

each calendar month the amount of gross sales and the number of baskets shipped during said month.

IV.

That on or about the 15th day of July, 1942, the defendant reported to plaintiff that the accumulated and unpaid royalties due plaintiff from baskets manufactured, shipped and sold by the defendant and its said subsidiary or affiliate corporation aggregated as of June 30, 1942, $16,437.48, no part of which has been paid by said defendant or by said Veneer Products Company, but said [21] defendant admitted in its said report that said sum was the unpaid balance of the royalties payable under the licenses covered by the contracts between plaintiff and the defendant and said Veneer Products Company, and also admitted by said defendant as the amount of its liability to plaintiff under said contracts and licenses; that plaintiff has no information as to the amount of such royalties except the report so made by the defendant; that defendant has refused and neglected, and still refuses and neglects, to pay the said royalties or any part thereof.

V.

That the baskets manufactured by said Veneer Products Company are so manufactured under the domination and control as aforesaid of the said defendant, and are sold by the defendant under some contract or agreement between the plaintiff and said Veneer Products Company, and said defendant purports to include in its monthly reports to

this plaintiff the baskets manufactured by both the defendant and said Veneer Products Company, but for the reasons hereinbefore alleged plaintiff has no information as to the correctness of said reports except the statements made by the defendant. [22]

VI.

That plaintiff is informed and believes, and so alleges the fact to be, that the defendant does no business and sells no baskets in the State of Michigan and has no property or assets in said state; that more baskets manufactured by the defendant and its said subsidiary or affiliate corporation under the licenses granted by the plaintiff to said corporations are sold in the State of Idaho than in any other state; that defendant sells upwards of 200 carloads of such baskets in the State of Idaho during the fruit packing season of each year, and in order to develop and maintain the market for such baskets in the State of Idaho the defendant has several agents or distributors in said state, and it ships its baskets, generally, in carload lots into said state for present and future use in filling its orders, and sales made in the State of Idaho are repeatedly made from supplies owned by defendant in said state either from carload shipments consigned to the defendant in the State of Idaho or from stocks warehoused by or for defendant in the state; that executive officers and sales managers of the defendant spend upwards of 60 days each year in the State of Idaho during the fruit packing and shipping season, promoting sales of baskets and calling upon dealers and growers who are prospective

buyers of baskets, in an endeavor to sell baskets so manufactured by defendant and its said affiliate corporation under the licenses covered by their contracts with plaintiff; that C. H. Kinney, General Sales Manager of defendant, at the time of the service on him of the Summons in this action was in the State of Idaho on defendant's business and promoting the sales of its baskets and otherwise carrying on defendant's business in the State of Idaho; that said defendant at the time of the commencement of this action was and for several years prior thereto had been continuously doing intrastate business in said state, and said C. H. Kinney then was and for a long time [23] prior thereto had been president of said Veneer Products Company and General Sales Manager, as aforesaid, of the defendant, not only in the State of Idaho but in upwards of 25 other states, and the main or principal office of said C. H. Kinney was at the office of the defendant in Paris, Texas.

Wherefore, Plaintiff prays: That plaintiff may have judgment against the defendant for the sum of $16,437.48 with interest as provided by law.

3. That plaintiff may have such other and further relief as may be just and proper under the circumstances, and for its costs herein.

RICHARDS & HAGA
Attorneys for Plaintiff.
Residence: Boise, Idaho.
OLIVER O. HAGA
Of Counsel for Plaintiff.

[Endorsed]: Filed April 6, 1942. [24]

[Title of Court and Cause.]

AFFIDAVIT OF OLIVER O. HAGA

State of Idaho,
County of Ada—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says:

That on or about the 14th day of February, 1941, C. N. Kinney of Denver, Colorado, father of C. H. Kinney, General Sales Manager of the above named defendant, was named as grantee in a certain deed from F. H. Hogue and Florence G. Hogue of Payette, Idaho, which deed conveyed to said C. N. Kinney upwards of nine separate properties in Payette County, Idaho, situated principally in Payette, New Plymouth and Fruitland, and included approximately 30 acres of orchards, warehouses, packing houses and other real estate; that said property was conveyed to said C. N. Kinney in trust for certain creditors of said F. H. Hogue, including, as affiant is informed and believes and so alleges the fact to be, the defendant, Cummer-Graham Company;

That although the defendant, Cummer-Graham Company, claims to have no interest in said property or trust, the president of said company, one J. A. McGill, is named in the trust agreement as one of the principal creditors of said F. H. Hogue, [25] but it appears from the official reports made by said C. N. Kinney to the creditors of said F. H. Hogue that said defendant, Cummer-Graham Com-

pany, advanced to said C. N. Kinney for use in maintaining and caring for and managing said trust property $7,000.00 during the year 1941, which was substantially all the moneys advanced to said C. N. Kinney for use in connection with said property during said period.

OLIVER O. HAGA

Subscribed and sworn to, before me, this 6th day of April, 1942.

[Seal] J. L. EBERLE
Notary Public for Idaho
Residence: Boise, Idaho.

[Endorsed]: Filed April 6, 1942. [26]

[Title of Court and Cause.]

OPINION

Richards & Haga,
Boise, Idaho,
Attorneys for the Plaintiff

George Donart,
Weiser, Idaho
Frederick P. Cranston,
Denver, Colorado
Attorneys for the Defendant.

April 15, 1942.

Cavanah, District Judge.

The defendant presents his motion to dismiss in which it urges the quashing of the service of summons on the ground that the action is brought in

the wrong district, as the jurisdiction of the Court is involved on the ground of diversity of citizenship as it appears that the plaintiff is a Michigan corporation and the defendant is a Texas corporation who is not qualified to do or engage in business in the State of Idaho.

The motion is based on the complaint, affidavits and depositions.

The question requires the consideration and application of paragraph (a) of Section 112 Title 28 U. S. C. A. under the facts presented, as it is there provided: "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is apparent that the present suit is based on diversity of citizenship and is not brought in the district of the residence of either plaintiff or defendant or that the defendant, [27] a foreign corporation, has designated in conformity with the State law, an agent upon whom service of process may be made, but is upon the contention of the plaintiff that the defendant has waived this requirement of the statute and consented to be sued in the federal court by reason of the parties bringing about a state of facts which has authorized the federal court to take cognizance of the case.

If the facts presented create such a situation then it is urged that the case is governed by the late principle announced by the Supreme Court in the case of Neibro et al., v. Bethlehem Shipbuilding Corporation Ltd., 308 U. S. 165, where service was made upon a designated agent in conformity with state statute, and where the Court said: "jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit,—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. * * * Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." This interpretation and application of the statute as respects jurisdiction of the federal courts over a corporation where the question of diversity of citizenship was involved, has announced a broader construction of Section 112 Title 28.

What then is the situation here which we are required to consider under the Neibro case? Does the conduct of the defendant corporation constitute a waiver of the federal statute? Has it consented by reason of its conduct to be sued in the federal court?

The defendant did not designate a person upon whom summons may be served within the State and service was made upon C. H. Kenny a sales man-

ager of the defendant when he was within the State. Did the conduct of the defendant and its sales manager establish that it was doing business within the State to an extent that will authorize service of process on an agent or officer of the corporation in [28] determining the presence of a corporation within the State so that service may be made? It seems to be the rule that a person upon whom service was made must be an agent or representative of the defendant authorized to represent it and did so in transacting business of the corporation within the State, and that service of summons was made upon him within the State. The power to receive service of process by the agent or one authorized to represent a corporation can fairly be implied from the kind and character of agent employed. Rendleman v. Niagara Sprayer Co., 16 Fed. (2) 122.

The facts alleged in the complaint and disclosed by the affidavits and depositions indicate the presence of the defendant in the State of Idaho, as its, and its general sales manager's course of conduct were of such a nature and extent enabling the Court to say that the defendant is carrying on business in such sense as to manifest its presence within the State. Its acts of business in the State were sufficient to show an intent on its part to carry out and make it an effective part of the its field of operation and its business. Mr. C. H. Kenny's, upon whom service of summons was made, activities and jurisdiction covered twenty-six states. He was

authorized to conduct the sales of baskets which was the principal business of the defendants, and holds positions with the defendant's affiliated companies. He travels in twenty-six states, supervising sales with wholesalers, and assists in sales work, looking after collection, taking orders and doing anything that comes up in the handling and selling of merchandise. The defendant does an extensive business within the State of Idaho, and C. H. Kenny supervises all sales there, and he stated as to his duties: "Oh, my, there are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in,—everything connected with sales work, I would say." He helped the defendant's dealers or jobbers in Idaho to do anything that would help promote sales, and spent upwards of sixty days a year in Idaho as sales manager and promoting defendant's business in diverting cars, making collections and sales. [29]

Defendant had consignment agreements with distributors or jobbers for carry-over baskets, and operated at times on a commission basis with others. When such agreements were made on consignment, baskets were shipped on order and sold on commission and if not sold the baskets would have to be returned, or the money.

Notice of garnishment was served in Idaho upon those having a large number of baskets belonging to the defendant. The evidence indicates that when

the baskets were shipped on commission agreements and the price of baskets carried over for the next year, the distributors or jobbers would have to inquire of the defendant what he was to sell them for, thereby creating a selling agreement operating system on a commission basis, and the price was subject to regulation by the defendant as owner of the baskets. In other words the defendant had brought its property into the State and retaining title thereto until it was sold in some instances at such price it could fix after being in the State. Some of the testimony showed that the defendant had sold direct to growers in Idaho. It seems that C. H. Kenny had negotiated contracts in Idaho with dealers, directed cars to customers and advised them that he had done so. It is therefore, from these and other facts in the record evident that C. H. Kenny at the time of the service of the summons upon him held a responsible and important position and as a representative of the defendant.

The laws of Idaho authorizing service of summons upon a foreign corporation doing business in the State without having designated a person upon whom process may be served authorizes the service of summons upon the County Auditor, section 5-607 I. C. A.

This provision of the State statute has been construed by the Supreme Court of the State in the case of Boise Flying Service v. General Motors Acceptance Corporation 55 Idaho 5; 36 Pac. (2) 813 and a foreign corporation would be subject to suit

in the State courts. The rule laid down in that case, when applied to the facts here, the defendant is doing business in the State.

It is clear that all acts and things the defendant did combined, constituted doing business. [30]

Under facts similar to those disclosed by the affidavits and depositions here the Courts have held such activities by foreign corporations as doing business within the State and is subject to the service of summons giving federal courts jurisdiction. Harbich et al v. Hamilton Brown Shoe Co. et al., 1 Fed. Supp. 63; Clements v. MacFadden Publications Inc., et al., 28 Fed. Supp. 274; Beach v. Kerr Turbine Co., 243 Fed. 706; Michigan Aluminum Foundry Co., v. Aluminum Castings Co., et al., 190 Fed. 879; Toledo Computing Scales Co., v. Computing Scales Co., 142 Fed. 919.

Each case must stand on its peculiar facts and jurisdiction may be asserted when the facts show that inferences may be fairly drawn that the corporation is present in the State. Such inference may be drawn as well as the direct facts that the defendant is present and doing business in the State.

The motion to quash the service of summons is overruled.

[Endorsed]: Filed April 15, 1942. [31]

[Title of Court and Cause.]

ORDER

In harmony with memorandum opinion filed this date, it is Ordered that the defendant's motion to quash the service of summons be and the same is overruled.

Dated April 15, 1942.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed April 15, 1942. [32]

[Title of Court and Cause.]

MINUTES OF THE COURT OF
MAY 7, 1942

Further hearing on the defendant's motion to dismiss having been set for this time and no appearance being made by counsel for oral argument,

The Court ordered that said motion be and the same hereby is denied. [33]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Filed May 16, 1942

Comes now the defendant and without answering to the merits but expressly re-asserting that this Court does not have jurisdiction over the defendant

for the reasons set forth in defendant's Motion to Dismiss, and for the reasons set forth herein, answers as follows:

1. Defendant denies that at any time it has done or that it now is doing business in the State of Idaho as set forth in the Complaint or in any other manner.

2. Defendant alleges that it has at no time been and is not now engaged in doing business in the State of Idaho, and has not and is not qualified to do business in the State of Idaho.

3. Defendant alleges that this action has not been brought in the district of the residence of either the plaintiff or the defendant and that the venue of this action has been improperly laid.

4. Defendant alleges that it is not subject to service of process within the District of Idaho, and has not been properly served with process in this action.

5. Defendant alleges that all sales and shipments of baskets made in or into the State of Idaho were made as part of interstate commerce transactions. Defendant denies that it at [34] any time has had or that it now has any stocks warehoused by or for it in the State of Idaho.

6. Defendant denies that it has or has at any time had agents or distributors in Idaho. It admits that it has and has had customers in Idaho, but it denies that said customers are or have at any time been its agents or distributors, but on the contrary, it alleges that said terms have been loosely used to describe customers. It alleges that the trans-

actions with such persons have been limited to purchases and sales, and such persons have purchased defendant's merchandise, but have not acted and have had no authority to act as defendant's agents or representatives.

7. Defendant admits that as a part of interstate commerce transactions it has shipped its baskets into the State of Idaho and before such interstate shipments had ceased and while the baskets were in the original freight car or cars which had originated outside of the State of Idaho, and before said original shipments had been broken and before any delivery thereof had been made, defendant filled orders by diverting said cars to its customers in order to fill orders for sales of said merchandise. It alleges that in none of such cases was it contemplated when such shipment originated from points outside of the State of Idaho that delivery would be made to defendant in the State of Idaho, and in none of such cases was delivery so made. Except as above admitted, defendant denies that it ships or has shipped its baskets in or into the State of Idaho for present or future use in filling its orders and except as above admitted, it denies that sales made in the State of Idaho are or have been made from supplies owned by defendant in the State of Idaho or from shipments consigned to defendant in the State of Idaho or from stocks warehoused by or for defendant in the State of Idaho.

8. Defendant admits that its executive officers

upon infrequent occasions, and for short periods of time, and its sales [35] manager for periods not exceeding a total of sixty days in any one year have been in the State of Idaho. Except as above admitted, defendant denies that its executive officers or sales manager have spent any periods of time in the State of Idaho. Defendant alleges that C. H. Kinney was not and that at no time has been an officer or director, or general agent, or local agent, or an agent in any manner authorized to receive or accept service of process of or for defendant.

9. Defendant denies that at the time of the commencement of this action or at any other time defendant was or that it now is continuously or otherwise doing any intra-state business in the State of Idaho.

10. Defendant refuses to answer any allegations of the Amended Complaint concerning the merits of the action, and declines in any manner to plead to the merits.

Wherefore, Defendant prays that this action be dismissed.

GEORGE DONART
of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg.,
Denver, Colorado.
Attorneys for Defendant.

Defendant's Address:
Paris, Texas.

[Endorsed]: Filed May 16, 1942. [36]

[Title of Court and Cause.]

MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

Comes now the above named Plaintiff, Straight Side Basket Corporation, a corporation, and moves the Court for a Summary Judgment herein under Rule 56 of the Federal Rules of Civil Procedure, because Defendant's Answer to plaintiff's Amended Complaint presents only questions of law which were heretofore argued, briefed and submitted to the Court for decision under defendant's Motions to Dismiss and which questions were heretofore decided in favor of plaintiff and against defendant; that the pleadings and decisions on file herein show there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, for an accounting as prayed in the Amended Complaint, and for judgment for the amount that will be found due upon such accounting, and for such other and further relief as the Court may deem just, with costs.

May 23, 1942.

RICHARDS & HAGA
Attorneys for Plaintiff.
Residence: Boise, Idaho.

[Endorsed]: Filed May 25, 1942. [37]

[Title of Court and Cause.]

NOTICE OF AMENDMENT TO AMENDED COMPLAINT

To The Above Named Defendant and to Messrs. George Donart and Frederick P. Cranston, Attorneys of Record for said Defendant:

You And Each Of You Will Please Take Notice that at the time of the hearing on Plaintiff's motion on August 11, 1942, for summary judgment, plaintiff will request leave to amend its Amended Complaint herein as follows:

By striking out in the first line of paragraph IV of its Amended Complaint the word "March" and substituting "July" and in the fifth line of said paragraph the words and figures "February 28" and substituting "June 30", and by striking out the figures "$11,894.07" and substituting "$16,-437.48"; also by striking out all requests for an accounting, both in the body of said Amended Complaint and in the prayer thereof, and by striking out the figures "$11,894.07" in paragraph 2 of the prayer and substituting the figures "$16,437.48", and by striking out "February 28" and substituting "June 30" in said paragraph.

The effect of said amendments will be to request the court to enter judgment against defendant for

the sum of $16,437.48 as the amount due plaintiff at the end of June, 1942.

Dated this 1st day of August, 1942.

RICHARDS & HAGA

Attorneys for Plaintiff

(Affidavit of Service Attached)

[Endorsed]: Filed August 10, 1942. [38]

[Title of Court and Cause.]

AMENDMENTS TO AMENDED COMPLAINT

Comes now the plaintiff, The Straight Side Basket Corporation, and pursuant to notice given the defendant herein on the 1st day of August, 1942, and by leave of Court first had and obtained, and amends its Amended Complaint herein by interlineation as follows:

1. In paragraph IV strike out the word "March" from the first line of said paragraph and substitute the word "July" and in the fifth line of said paragraph strike out the words and figures "February 28, 1942, $11,894.07" and substitute therefor "June 30, 1942, $16,437.48".

2. In line eleven from the bottom of paragraph IV insert a period after the word "thereof" in lieu of the comma and strike out the balance of said paragraph, which reads as follows:

> "all of which said royalties so remaining unpaid have accumulated, as plaintiff is informed and believes and so alleges the facts

to be, for upwards of two or more years; that it is impossible for plaintiff to ascertain the amount actually due it from royalties under the licenses issued to the defendant and its said affiliate or subsidiary, Veneer Products Company, without a full, true and correct account being made by the defendant of the number of baskets manufactured and sold under said licenses including the baskets manufactured by said Veneer Products Company under the domination and control of the defendant and sold by or through the defendant."

3. Strike out paragraphs 1 and 2 of the prayer and insert in lieu thereof a new paragraph reading as follows:

"That plaintiff may have judgment against the defendant for the sum of $16,437.48 with interest as provided by law."

Dated August 11, 1942.

RICHARDS & HAGA
Attorneys for Plaintiff
Residence: Boise, Idaho.

ORDER

The foregoing amendments are allowed and may be made by interlineation.

Dated August 11, 1942.

CHARLES C. CAVANAH
District Judge

[Endorsed]: Filed Aug. 11, 1942. [39]

[Title of Court and Cause.]

MINUTES OF THE COURT OF AUGUST 11, 1942

This cause came on for hearing on the plaintiff's motion for summary judgment.

The plaintiff's counsel, O. O. Haga, Esquire, applied to the Court for leave to amend the amended complaint by interlineation. The defendant's counsel, George Donart, Esquire, offered no objections, whereupon the Court granted the application to amend, and granting the defendant time to answer the complaint as amended.

Hearing on the motion for summary judgment was continued to September 1, 1942. [40]

[Title of Court and Cause.]

ADOPTION OF MOTION AND ANSWER

Comes now the defendant and adopts its motion to dismiss directed against the original complaint, and its answer to the original complaint as its motion to dismiss against all action alleged in the amended complaint, and as its answer to the

amended complaint; and it submits the same upon the record and evidence heretofore introduced.

GEO. DONART
of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg.,
Denver Colorado,
Attorneys for Defendant.

Defendant's Address:
Paris, Texas.

[Endorsed]: August 18, 1942. [41]

In the District Court of the United States for the District of Idaho, Southern Division

No. 2152

THE STRAIGHT SIDE BASKET CORPORATION, a corporation,
Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,
Defendant.

SUMMARY JUDGMENT

This action came on for hearing this 1st day of September, 1942, on plaintiff's motion for summary judgment on the pleadings under Rule 56 of the Federal Rules of Civil Procedure; and the Court

having heard counsel for the parties and considered the record, the pleadings, affidavits, depositions, exhibits and evidence submitted by the respective parties; and it being admitted that defendant's answer to the complaint as amended presents the identical questions heretofore considered and determined by the Court in favor of plaintiff and against defendant on the latter's motion to dismiss,

It Is Hereby Ordered And Adjudged that the plaintiff, The Straight Side Basket Corporation, have judgment against the defendant Cummer-Graham Company, a corporation, for the sum of $16,437.48, with interest thereon from the 1st day of July until the date hereof at the rate of 6% per annum, which interest amounts to the sum of $164.37, and making in the aggregate of principal and interest as of this date the sum of $16,601.85, and judgment for said sum is hereby entered against said defendant together with costs taxed at $232.14, and plaintiff may have execution therefor.

Done in open court this 1st day of September, 1942.

CHARLES C. CAVANAH
District Judge

[Endorsed]: Filed September 1, 1942. [42]

[Title of Court and Cause.]

DEPOSITIONS OF C. H. KINNEY, A. V. KINNEY & A. C. MACKIN

Appearances:

Ned Stewart,
Texarkana, Texas,
Attorney for Plaintiff.

O. B. Fisher,
Paris, Texas,
Attorney for Defendant.

The Depositions of C. H. Kinney, A. V. Kinney, and A. C. Mackin, taken at the office of O. B. Fisher, 501 Liberty National Bank Bldg., Paris, Texas, to be read in evidence in the above styled cause, said depositions being taken by agreement of counsel for both parties with all formalities waived, the taking, transcribing and forwarding of said depositions also being waived, as well as the signatures of the witnesses, reserving, however, the right to except at the time of the trial or hearing to any evidence so introduced for any reason whatever.

It is also agreed and understood that a copy of these depositions may be used in evidence in any other case pending in any other court between the same parties to this suit, and particularly in the case pending in U. S. District Court for the Eastern District of Texas, Paris Division, styled Cummer-Graham Company vs. The Straight Side Basket Corp., a duplicate original to be filed in such case

of Cummer-Graham Company vs. The Straight Side Basket Corp. pending in the District Court of the United States for the Eastern District of Texas.

[43]

MR. C. H. KINNEY

After being duly sworn, testified as follows:

Direct Examination

By Mr. Stewart, Attorney for the Defendant.

Q. Your name is C. H. Kinney?

A. That's right.

Q. You are a resident of Paris, Texas, Mr. Kinney, are you not? A. I am.

Q. What position do you now hold with the Defendant, Cummer-Graham Company?

A. Sales Manager.

Q. Mr. Kinney, when the Summons involved in this case was originally served on you in Idaho, I believe on October 30, 1941, at Payette, Idaho, what position did you occupy at that time with Cummer-Graham Company? A. Sales Manager.

Q. Now how long have you held the position of Sales Manager for Cummer-Graham Company?

A. I think it is since about November 1930—ever since I have been with them.

Q. Since some time in 1930?

A. '38. About November '38, I would say.

Q. Now what were you doing in Idaho on October 30, 1941, when the Summons was served on you in this particular case?

(Deposition of C. H. Kinney.)

A. Attending to general routine business.

Q. Were you attending to general routine business for the Defendant, Cummer-Graham Company? A. Yes.

Q. Were you in Idaho at that time at the expense of Cummer-Graham Company? A. Yes.

Q. Now what are your duties in connection with your title as Sales Manager for Cummer-Graham Company?

A. Traveling about twenty-six states, supervising sales, dealers—that is wholesalers, and assisting in sales work, taking orders, looking after collections—anything that comes up in the handling and selling of merchandise. [44]

Q. Does Cummer-Graham Company do quite an extensive business in Idaho? A. Yes.

Q. In your capacity as Sales Manager do you have charge of the sales made in the State of Idaho?

A. Yes, supervise them. I might modify that though. In charge of them under the supervision of the board of directors of the Cummer-Graham Company. That is understood, I guess, in such a question.

Q. Now who composes the Board of Directors of the Cummer-Graham?

A. The Directors of Cummer-Graham.

Q. Who are those directors?

A. Mr. Mackin, Mr. McGill, Mr. DeShong, Mr. Norton and I guess Mr. Hudnell.

(Deposition of C. H. Kinney.)

Q. Are you a member of the Board of Directors yourself, Mr. Kinney? A. I am not.

Q. Now who else besides yourself connected with Cummer-Graham Company has anything to do with the business transacted in Idaho or the sales in Idaho?

A. Now, or in the past? You would have to be more explicit.

Q. Speaking of around October 30, 1941.

A. Well there was no one working in Idaho at that time but me.

Q. Prior to October 30, 1941, have there been any other parties connected with Cummer-Graham looking after any of its sales or other business in the State of Idaho?

A. A. V. Kinney. Mr. McGill has been out there at times. Mr. Norton. I guess that would almost cover it.

Q. But on October 30, 1941, the date you were served with Summons in Idaho in this case, you were the only one in the State of Idaho at that time connected with Cummer-Graham Company?

A. That's right.

Q. Now Mr. Kinney, does Cummer-Graham Company own the Veneer Products Company?

A. The Veneer Products Company is a corporation.

Q. Does Cummer-Graham Company own the controlling stock in that corporation or any part of the stock? [45]

(Deposition of C. H. Kinney.)

A. That, I don't know.

Q. Where are the records of the Veneer Products Company Inc. kept?

A. At the office of the Cummer-Graham Company.

Q. In Paris, Texas? A. In Paris.

Q. But you do not know yourself as to whether or not Cummer-Graham owns the majority or any part of the corporate stock of the Veneer Products Company? A. No, I don't know that.

Q. Now who is the President of the Veneer Products Company? A. I am.

Q. Does the Veneer Products Company sell any of their merchandise direct in the State of Idaho?

A. It does not.

Q. Does the Veneer Products Company sell all of their production to Cummer-Graham?

A. They do.

Q. Is the Veneer Products Company a Texas corporation? A. It is not.

Q. Under the laws of what state is the Veneer Products Company incorporated?

A. Colorado.

Q. State, if you know, whether or not a complete set of records separate and apart from the Cummer-Graham records is kept for the Veneer Products Company here in the general offices of the Cummer-Graham Company?

A. Yes, complete separate records.

Q. Now Mr. Kinney, can you give a rough esti-

(Deposition of C. H. Kinney.)

mate of the volume of sales in Idaho for the year 1941 made by Cummer-Graham Company? [46]

A. 1941—I couldn't under that description. The Cummer-Graham fiscal year is June to June and the records of course on that is part '41 and '42 and '40 and '41.

Q. Then can you give an estimate on the volume of business conducted within the period from June 1940 to June 1941?

A. Yes. It would be an estimate without referring to the books, and would you want the undelivered price, with or without freight?

Q. It really doesn't matter. If you can, estimate the number of carloads shipped to Idaho.

A. Oh, I would say close to two hundred cars, all types of containers.

Q. That estimate of two hundred cars represents all types of containers shipped by Cummer-Graham Company to destinations in Idaho? A. Yes.

Q. Now Mr. Kinney, does Cummer-Graham Company sell direct to orchard owners in Idaho?

A. No, the business is carried on through jobbers or wholesalers.

Q. Then as I understand your answer, no shipments are made direct to orchard owners?

A. There is no direct policy against it except it isn't handled that way.

Q. And all of your business is sold through jobbers or distributors in Idaho? A. Yes.

Q. Now does Cummer-Graham ever ship any containers to itself in Idaho?

(Deposition of C. H. Kinney.)

A. Yes. Never delivers to itself.

Q. Mr. Kinney, are there numerous instances in which Cummer-Graham is the consignor and also the consignee in bills of lading covering shipments of containers to Idaho? A. Yes. [47]

A. (Contd.) It is necessary under what we call the "roller system".

Q. Are any of these cars diverted after they reach Idaho?

A. They are all diverted somewhere in transit.

Q. In those shipments made by Cummer-Graham Company to Cummer-Graham Company do you use any particular point in Idaho as the destination?

A. Diversion point is generally Nampa.

Q. That's in Idaho?

A. Yes, Nampa, Idaho.

Q. Then from time to time, as those cars reach Nampa, Idaho, they are diverted to other parties or concerns in Idaho? A. Correct.

Q. Now do you have authority to divert those cars for Cummer-Graham Company? A. Yes.

Q. And did you from time to time divert the cars?

A. Very seldom. As a rule they are shipped in care of one of the agents, Reilly-Atkinson or Hogue and the diversions are handled by them. If anything should happen in an emergency that they were needed quick, I wouldn't have time to handle all those things.

(Deposition of C. H. Kinney.)

Q. And I believe you said that in some instances you did handle diversions?

A. Yes, I have handled diversions, both Paris and Idaho. Very often handle from the Paris office.

Q. But you also have handled some of the diversions in Idaho? A. Yes.

Q. Now when Reilly-Atkinson or Mr. Hogue handle the diversions who gives them their instructions?

A. They come from the Paris office.

Q. If the diversions are made at a time when you are in Idaho do you have authority to give them instructions? [48]

A. For diversions?

Q. Yes sir. A. Yes.

Q. Now Mr. Kinney, do you spend any considerable length of time in Idaho during the harvest season?

A. Oh, it is all according to conditions. Sometimes more time than others. Generally a week or ten days at a time and back two or three times in a season.

Q. Does Cummer-Graham maintain any kind of an office in Idaho? A. They do not.

Q. Have they ever maintained any kind of an office?

A. No. You are speaking of the Cummer-Graham Company?

Q. Yes. I believe you said in your affidavit

(Deposition of C. H. Kinney.)

which was filed in this case in support of Cummer-Graham's motion to dismiss that you spend a maximum of two months per year in Idaho.

A. That's approximately correct. That wouldn't be all at one time.

Q. Then while you are *in* Idaho, Mr. Kinney, state specifically just what you do for Cummer-Graham while you are out there.

A. Oh my! There are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in—everything connected with sales work, I would say.

Q. Do you call on your customers from time to time while you are out there and make sales to them? A. Dealers.

Q. To growers, or owners of the orchards?

A. Oh, I call on lots of them.

Q. Do you make any direct sales to owners of the orchards? A. No.

Q. Do you make any direct collections while you are in Idaho from the orchard owners?

A. Well I wouldn't say. I don't think I have. I would if I could. Any collection work is done to help your dealer out—get his money in. [49]

Q. Are the charges in all instances made by Cummer-Graham Company against the jobbers or distributors in Idaho for Cummer-Graham Company?

(Deposition of C. H. Kinney.)

A. Practically all times. There might be some exceptions. A dealer might write you to send a sight draft car out to someone direct or something like that.

Q. Now at one time, Mr. Kinney, didn't you have an office in Reilly-Atkinson Warehouse in Payette, Idaho? A. Me?

Q. Yes sir.

A. No. Just to help you out, my brother did.

Q. Then when you are in Idaho, do you make any direct sales to the consuming trade?

A. You will have to get into a much discussed (and cussed) definition.

Q. What I mean is do you go out and call on the owner of an orchard and make a sale to him of the products of Cummer-Graham Company and then ship that order to one of your jobbers or independent dealers?

A. The calls made on the growers are generally in company with the salesman of the jobber or dealer.

Q. Then if you make a sale to a grower the sale is actually credited to the jobber or dealer with whom you are calling on the customer at the time?

A. That's right.

Q. You do actually solicit business for Cummer-Graham while you are out there?

A. I am salesman—yes.

Q. And you also solicit business for the jobbers or independent dealers of Cummer-Graham in Idaho?

(Deposition of C. H. Kinney.)

A. Anything that will help promote sales.

Q. Now while you are in Idaho, Mr. Kinney, do you make any collections from these jobbers or independent dealers? [50]

A. Well there happen to be a class that if you don't make the collection you push them up to send the money in, because if you could, you would make the collection.

Q. Do you make new agreements from time to time in Idaho with the jobbers or independent dealers for Cummer-Graham Co.?

A. No. The agreements are pretty well set at the beginning of the year by the directors and they carry through—very little change in them from year to year.

Q. But when you are in Idaho, do you have to follow through with any directions given you by the directors as to any new contracts or any contracts that might be carried over from year to year?

A. Any change of policy has to be approved by the Board of Directors. Any written order taken has to be approved in writing by the Paris office before it is considered valid, and so stated in the sales order blank.

Q. For instance, Mr. Kinney, if you had some change of terms and conditions to make with one of your jobbers or independent dealers in Idaho and the Board of Directors authorized that change and ordered you to negotiate with the jobber or independent dealer to make the change, did you, while you were in Idaho attempt to do that?

(Deposition of C. H. Kinney.)

A. Did I attempt to do it?

Q. Yes sir.

A. I didn't know anything come up where such an order had been issued.

Q. Then you state there has not been a condition come up similar to that?

A. Not that I can recall, recently.

Q. Are there any times when you actually get a check from one of your jobbers or wholesale distributors and forward the check yourself to Cummer-Graham Company's office at Paris, Texas?

A. I would say it would be possible. I can't remember any exact instances. [51]

Q. Now in getting ready for the harvest season in Idaho, state whether or not, Mr. Kinney, you go to Idaho and confer with your jobbers and wholesale distributors in order to determine the approximate amount of their needs during the coming harvest season? A. Yes.

Q. Then after that estimate is determined do you convey that information back to Cummer-Graham Company here in Paris?

A. Generally back here. Handle it in my reports. I am never gone very long at one time.

Q. Will you give us the names of some of your jobbers and independent distributors in Idaho?

A. As they exist now?

Q. Yes sir.

A. Reilly-Atkinson Company, Boise, F. C. Hogue, Payette.

(Deposition of C. H. Kinney.)

Q. Do you remember any additional jobbers or independent distributors you might have?

A. I think that's all we have right now. We have had others.

Q. Now Mr. Kinney, in the affidavit which I referred to a few minutes ago which was filed in support of Cummer-Graham's motion to dismiss, you stated that Cummer-Graham had been represented in its business transactions in Idaho at various times by Arthur V. Kinney, Wallace Norton, J. C. DeShong and J. A. McGill. Do all of these parties also make trips to Idaho?

A. Only on special occasions.

Q. And on those special occasions when they do make those trips, who are they in Idaho representing?

A. Cummer-Graham Company, if they go out for Cummer-Graham Company. I don't know whether they make any individual trips or not. I woudn't try to testify on that.

Q. Now if I am correct in my assumption I believe the fruit harvest starts in Idaho some time around the first of September, does it not?

A. Yes, earlier than that, some of it. [52]

Q. And is it during that harvest when you make your trips to Idaho?

A. Before, during and after. I make Idaho you see, going to other territories and double back through.

Q. Now Mr. Kinney, I believe C. N. Kinney was your father, was he not? A. Right.

(Deposition of C. H. Kinney.)

Q. He is deceased now is he not?

A. That's right.

Q. Was he in the employ of Cummer-Graham Company? A. No.

Q. Has he ever been in the employ of Cummer-Graham Company? A. No.

Q. Now does Cummer-Graham Company own any orchard lands in Idaho? A. No.

Q. Does anyone else as Trustee for Cummer-Graham Company have title to any orchard lands in Idaho? A. No.

Q. You are familiar with the Hogue orchards are you not? A. Yes.

Q. Does Cummer-Graham now or have they ever had a mortgage on those orchards?

A. No, not now or ever.

Q. Now who has operated the Hogue orchards during the 1941 season?

A. C. N. Kinney is Trustee for all the Hogue creditors, under a general assignment.

Q. And who paid C. N. Kinney for his services?

A. He paid himself.

Q. What kind of an agreement did he have with the trustees for all the creditors?

A. Well it was a basis of commissions on monies handled and general assignment agreement, such as you would be familiar with as adopted by the National Credit Men's Association.

Q. Did Cummer-Graham Company sign that agreement? A. No. [53]

(Deposition of C. H. Kinney.)

Q. Were they one of the Hogue creditors?

A. No.

Q. Then Cummer-Graham Company was not interested in the Trustees' agreement which was executed by all of the creditors of Hogue in connection with the operation of his orchards?

A. No.

Q. Did Hogue owe Cummer-Graham Company at the time? A. No.

Q. Did Hogue owe the Basket Sales Company of Dallas? A. Yes.

Q. Didn't Cummer-Graham purchase from the basket Sales Company of Dallas certain notes and obligations of Mr. Hogue?

A. I don't know. I can't answer that. That is out of my department.

Q. Well do you know what became of the indebtedness of Mr. Hogue which was due the Basket Sales Company? A. It hasn't been paid.

Q. Did Cummer-Graham Company have any interest financially or otherwise in the indebtedness due by Mr. Hogue to the Basket Sales Company of Dallas?

A. In that the Basket Sales Company owed Cummer-Graham.

Q. Now do you know whether or not the Basket Sales Company ever assigned all or any part of the Hogue account to Cummer-Graham Company?

A. I know they didn't.

Q. Did Cummer-Graham Company ever collect what the Basket Sales Company owed them?

(Deposition of C. H. Kinney.)

A. No, not entirely.

Q. Now your father under that agreement actually had charge of the growing and the sale and disposition of the crop from those orchards?

A. Yes.

Q. And he was employed on a strictly commission basis under the terms of this agreement signed by Mr. Hogue's creditors?

A. The terms of the agreement speak for itself. I wouldn't try to remember exactly what it said. [54]

Q. Now in your affidavit which I have referred to several times, you state that "except for indebtedness due Cummer-Graham that Cummer-Graham has not acquired and does not own a substantial or any amount of orchard property in Idaho." Now what do you mean by the words "except for the indebtedness due Cummer-Graham"?

A. Now if you will analyze that, any property in Idaho except indebtedness, accounts receivable.

Q. Now does Cummer-Graham Company have a chattel mortgage or any other kind of mortgage or any instrument securing any indebtedness on any orchard or orchards in Idaho? A. No.

Q. And does Cummer-Graham Company by virtue of any trust agreement or otherwise have anyone holding title to any lands in Idaho for Cummer-Graham Company? A. No.

Q. Who now owns the Hogue orchards?

A. Hogue.

(Deposition of C. H. Kinney.)

Q. Have they been sold back to him by the creditors or was the indebtedness worked out?

A. No. You see they transferred to the trustees. The trustee takes the position of Hogue.

Q. In whose name is the title now?

A. In the names of Scott Brubaker for Hogue, appointed by the court at the death of C. N. Kinney.

Q. Was that the court in Colorado?

A. Idaho.

Q. At Payette, Idaho?

A. I don't really know which court it is in. I would believe that would be right though.

Q. And I believe you stated Mr. Kinney that Cummer-Graham now has no interest whatever in the Hogue orchards. A. Not any.

Q. And Cummer-Graham have never had any interest in the Hogue orchards? A. Never.

Q. Now was Mr. F. H. Hogue one of your independent distributors in the State of Idaho at one time? A. No sir. F. C. I said. [55]

Q. Was F. C. Hogue then one of your independent distributors?

A. He was and is now. What do you mean by independent distributor?

Q. I mean one of your jobbers or distributors. Now in the sale by Cummer-Graham to these jobbers and distributors are the sales made on an open account? A. Yes.

Q. Does Cummer-Graham Company retain the title to any baskets shipped to Idaho by any of these jobbers or distributors?

(Deposition of C. H. Kinney.)

A. They have a consignment agreement for any carry-over baskets.

Q. Then, if at the close of any harvest season a jobber or distributor of the Cummer-Graham Company have baskets to carry over to the following season, what arrangements does Cummer-Graham have with the jobber or distributor as to those particular baskets?

A. The account is carried over for him, with the baskets, so to speak, as collateral.

Q. Does Cummer-Graham take a mortgage on the baskets?

A. No. It is all done in good faith.

Q. Who carries the insurance on the baskets during——?

A. The jobber or distributor, with a "loss payable" clause to Cummer-Graham as the interest might appear.

Q. Then if a jobber or distributor carried over, we will say four carloads of baskets, Cummer-Graham Company carried the account for this jobber or distributor until the following season?

A. That's right, they do if requested. Sometimes they pay for them and carry themselves but if they need help we carry them.

Q. And if this is done, the baskets are stored in Idaho in the jobber's or distributor's warehouse?

A. Wherever they happen to be, I guess, at the time.

(Deposition of C. H. Kinney.)

Q. The jobber or distributor then takes out insurance with loss payable to Cummer-Graham Company as its interest might appear. A. Right.

Q. Now who pays for the insurance premium?

A. The jobber or distributor. [56]

Q. And who pays for the storage?

A. The jobber or distributor, generally in their own warehouse.

Q. Now when these baskets are finally sold and payment has been made to Cummer-Graham Company, is any consideration given to the insurance or storage as paid for by the jobber or distributor, when final settlement is made?

A. Not any.

Q. Although, by a "gentlemen's agreement" as you say, if the baskets carried over were destroyed by fire and there was an adjustment to be made with the insurance company carrying the fire insurance, if these baskets had not been paid for by the jobber or distributor, then Cummer-Graham would collect the loss as its interest might appear?

A. Good.

Q. Well, would they or would they not, Mr. Kinney? A. Haven't had it occur.

Q. If it did occur what would be the position of Cummer-Graham Company?

A. I imagine it would be according to the statement of the jobber and his financial set-up and how badly he needed the money and how badly we needed it and other conditions that would come up at the

(Deposition of C. H. Kinney.)

time the request was made. I think it would be handled on its merits. That would be something for the Board of Directors to decide at that time.

Q. Does Cummer-Graham at the present time have any kind of security whatever either in the form of a note or mortgage or anything executed by Mr. F. H. Hogue?

A. Cummer-Graham Company?

Q. Yes sir. A. No sir.

Q. Does F. H. Hogue at the present time owe Cummer-Graham Company anything, if you know?

A. That I don't know.

Q. Mr. Kinney, are any of your jobbers or distributors out there also growers?

A. At the present time, no.

Q. Were any of your jobbers or distributors during the year 1941 growers?

A. No. They could have been, but didn't happen to be.

Q. In connection with your trips to Idaho, state whether or not you devote any portion of your time to the sale of a [57] certain basket known as the "stitched-in bottom" basket?

A. It is one of our products.

Q. Do you devote any considerable amount of time in Idaho to encouraging the sale and use of this particular basket?

A. No more than any of our products. Gets equal treatment I guess.

Q. Does the "stitched-in bottom" basket consti-

(Deposition of C. H. Kinney.)

tute a substantial portion of the sales made in Idaho or not, by Cummer-Graham Company?

A. A very small percent of the sales.

Q. Now in 1940 and 1941, state whether or not Cummer-Graham Company, in addition to their own products and the products made by the Veneer Products Company sold other baskets in Idaho which were manufactured by other firms and in turn sold to Cummer-Graham for delivery to Idaho?

A. No. Not for delivery in Idaho.

Q. Did they purchase from other firms with any particular delivery in view? A. Yes.

Q. Now do you recall any of the firms from whom Cummer-Graham Company purchased baskets for resale by Cummer-Graham Company?

A. Yes, I believe we purchased some from Peacock. '40 and '41 I believe is what you have in mind in your question?

Q. Yes.

A. Trinity Manufacturing Company, Dayton Veneer Mills. I believe that's all.

Q. Now in what state does Cummer-Graham Company sell the most baskets each year?

A. Texas.

Q. What state would come next?

A. Baskets alone you mean?

Q. Well, baskets and other products.

A. Let me see. I haven't really studied it from that viewpoint.

Q. How far down the line or up the line would

(Deposition of C. H. Kinney.)

the State of Idaho rank in total volume of business done by Cummer-Graham Company?

A. It would rank foremost among the western states. Colorado and Idaho would run pretty close tie, I guess. [58]

Q. Are any of the baskets which are sold by Cummer-Graham Company in Idaho manufactured under the patent rights owned by the Straight Side Basket Corporation?

A. Would you state that again?

Q. Are any of the basket sold by the Cummer-Graham Company in Idaho manufactured under the patents owned by the Straight Side Basket Corporation? A. Lots of them.

Q. Does Reilly-Atkinson of Boise receive a commission from Cummer-Graham Company on all baskets of a certain type sold in the State of Idaho?

A. Yes.

Q. And do you have what you call a so-called consignment contract with the Reilly-Atkinson Company?

A. We handle it as such, I would say.

Q. Do you have any kind of a written agreement with Reilly-Atkinson Company?

A. Well, we have one. I don't know how old it is but we have just carried it forward and extended it from year to year.

Q. And would you, Mr. Kinney, for the purpose of this record supply the stenographer with a copy of any agreement which Cummer-Graham Company might have with Reilly-Atkinson Co.?

(Deposition of C. H. Kinney.)

A. I couldn't so promise. I don't even know if I could find it.

Q. If you could find the agreement with the Reilly-Atkinson Company would you furnish the stenographer for the purpose of this record and as Exhibit A to your testimony a copy of said agreement? A. Yes.

Q. Now do all of your jobbers and distributors wait until they have sold every carry-over basket before they pay Cummer-Graham Company?

A. No, I wouldn't say it worked either way. Sometimes they don't pay after they have sold them.

Q. And when final settlement is made with Cummer-Graham Company for the carry-over baskets, I believe you stated that Cummer-Graham does not bear any part of the expense of insurance and storage. A. That's right. [59]

Q. Now in connection with the so-called roller cars, have there been any occasions, Mr. Kinney, when any of these roller cars were sold by you to parties or firms or concerns in Idaho while you were there in Idaho during the harvest season?

A. I don't know as designated as roller cars. Possibly yes and possibly no. It would be in the regular course of business whatever it was. That's what the rollers are for.

Q. If you had in transit ten roller cars shipped from Cummer-Graham Company at Paris, Texas to Cummer-Graham Company at Nampa, Idaho, and you were in the State of Idaho at the time,

(Deposition of C. H. Kinney.)

would you make an effort to sell those ten cars prior to the time they reached their destination?

A. These rollers are always carried in care of someone like Atkinson and Hogue so it doesn't necessitate one of us being there.

Q. But in the event you are in Idaho and you are familiar with the fact that ten roller cars are moving, is it a portion of your duties in connection with Cummer-Graham Company to try to sell those ten cars of products?

A. No. Not necessarily as the ten cars.

Q. Well, do you try to sell any of these products while you are there?

A. Well, I try to sell all our products but not all the ten cars at one time.

Q. Well, assuming for the sake of argument you had ten so-called roller cars moving during the harvest in Idaho——

A. You mean are we apt to be in trouble there?

Q. Yes sir.

A. No, because they would go to one of the dealers. They are not shipped unless they have a home with either of the dealers. In case he doesn't want to divert it to special customers, he automatically takes them in if he hasn't got them placed.

Q. Now on the other hand, do you make an effort to sell any of these products while you are there in Idaho? [60]

A. I make an effort to sell all our products. That is part of my job.

(Deposition of C. H. Kinney.)

Q. Then if you had some roller cars moving to Cummer-Graham Co. at Nampa, Idaho while you were in Idaho and you sold two cars of the products, in this particular case who would advise the railroad company of the diversion?

A. I would get in touch with Hogue or Atkinson, whichever the cars were for and either have them divert it or have them mark their records I was diverting, one of the two.

Q. I believe you have already stated that in some instances you actually did the diverting.

Cross-Examination

By Mr. Fisher, Attorney for Defendant.

Q. Mr. Kinney, not definitely understanding the answer made by you a few minutes ago with reference to Cummer-Graham Company having at some time in the past purchased some product from some other manufacturer, you are asked to state whether or not within your knowledge Cummer-Graham or anyone acting for Cummer-Graham Company at any time purchased in the State of Idaho any products made by any other manufacturer?

A. Never.

Q. In the same connection please state whether or not Cummer-Graham Company, acting through any person, within your knowledge, at any time purchased any products of any character from any manufacturer to be delivered to Cummer-Graham Company in the State of Idaho? A. Never.

Q. Mr. Kinney, I believe you stated that at the

(Deposition of C. H. Kinney.)

time process was served upon you in Idaho on this case you were on routine business or something to that effect.

A. Yes, the day it was served, I had just got in there from California.

Q. Please state your exact capacity with Cummer-Graham Company at that time.

A. I was Sales Manager. [61]

Q. How long had you held such position?

A. Since 1938.

Q. As Sales Manager, what are your duties, briefly but completely.

A. Supervise the sale and distribution of baskets, my duties are.

Q. As such, have you any authority to pass upon credits or contracts? A. No.

Q. As such, have you any authority through the Board of Directors of that company or any executive officer of the company to do anything other than promote the sales of the products for the corporation? A. That's all.

Q. Have you at any time in the State of Idaho attempted to make any contract on behalf of Cummer-Graham? A. No.

Q. Has Cummer-Graham at any time in the State of Idaho, through you or within your knowledge received any products of any character for sale in the State of Idaho or elsewhere?

A. Never, that I know of.

Q. Mr. Stewart in his examination used the

(Deposition of C. H. Kinney.)

term "roller cars". Please explain what is meant by that term, if in your merchandising it has special meaning.

A. In fruit districts that are quite a ways from the factory, such as Idaho, and there are others, it takes sometimes twelve or fourteen days to make delivery of a car of baskets. Baskets are used for perishable items and we find it necessary to start a certain number of cars, what we call rollers, rolling so as to have them subject to quick diversion as needed.

Q. About what is the length of time under the present railway transportation system required for the transportation of cars of baskets from Paris, Texas to points in Idaho?

A. Seven days is the quickest. They have no definite schedule.

Q. What is the usual time required?

A. Well it will take from seven to twelve days and time such as now we have had them delayed much longer, due to troop movements, etc.

Q. Has Cummer-Graham Company sold any products in Idaho except through wholesalers or jobbers?

A. Not that I can recall. I wouldn't say there would be anything against it in principle. [62]

Q. Has Cummer-Graham at any time sold any of its products except in carload lots? A. No.

Q. Has it sold in the State of Idaho any products except products moving in interstate commerce from Paris, Texas, to that state?

(Deposition of C. H. Kinney.)

A. Nothing except moving in interstate commerce from different factories in Texas. Not all from Paris.

Q. Under the sales agreement and purchase agreement between Cummer-Graham Company and the respective jobbers in the State of Idaho during the years 1940 and '41, were shipments charged to the account of the purchasers at the time of the shipment and not otherwise or were different quantities of products sold to the jobber or purchaser at the beginning of the season for which such purchaser or purchasers were bound to pay?

A. Each car is charged as a separate item.

Q. With reference to the roller cars, when were charges made against buyers?

A. At the time the diversion was made. I would modify that a little. I think the books will show they were charged to the one they are shipped in care of at the time they are shipped. The Paris office charges them for the car. If the car is shipped care of Reilly-Atkinson, it is charged to Reilly-Atkinson and then if a diversion is made to Hogue Reilly-Atkinson receives credit.

Q. Then do we understand at the time the diversion is made, credit is given to the jobber in whose care the shipment was made and a charge made against the other person receiving the shipment through diversion? A. Yeah.

Q. Were any roller cars put in motion by Cummer-Graham at any time during either of the years mentioned except from the State of Texas?

(Deposition of C. H. Kinney.)

A. No.

Q. I have reference to the origin of shipments except any point in Texas.

A. We had some shipments originate in Georgia during the years 1940 and 1941.

Q. Did any shipments originate at any time during either of those years in the State of Idaho and reach their destination [63] in the State of Idaho?

A. No.

Q. Did you or did you not at any time have authority to divert any shipment between Texas or Georgia and the State of Idaho to a customer other than the customer in whose care the shipment was made, without the credit of such customer to whom the shipment was diverted being approved by the home office of Cummer-Graham or its Board of Directors?

A. I wouldn't have any authority without approval.

Q. Did you ever at any time make any diversion without the approval of the Board of Directors of your company of the credit of the person to whom it was made and the sale to that person?

A. No.

Q. Did or did not the firms referred to by you as Reilly-Atkinson and Hogue, at any time within your knowledge have any connection with Cummer-Graham Company other than as a wholesale purchaser of Cummer-Graham Company's products?

A. Not any.

(Deposition of C. H. Kinney.)

Q. Was or was not either of those firms at any time the agent of Cummer-Graham Company, within your knowledge? A. Never.

Q. That question was asked because it was recalled that some place in your testimony you referred to them as agents and this time I ask you to explain what you mean by that term?

A. The term of the trade—they are often referred to that way.

Q. If either was referred to as the agent of Cummer-Graham you meant that he or they were the purchasers of the Cummer-Graham Company's products as jobbers? A. Yes.

Q. Testimony was given with reference to carry-over baskets and you will please state now whether or not the baskets when delivered to a jobber, or rather when shipped to the jobber, are charged to him? A. They are.

Q. When are the accounts payable as to whether they are payable on demand or within ten days or twenty days or thirty days or fifteen days

A. It varies very often with the size of the credit approved, but is oftentimes changed. [64]

Q. Had you at any time the authority to make credit arrangements even to the extent of fixing the time of the due date of the account or was that left to the Board of Directors of the Cummer-Graham Company?

A. That is all done by the Board of Directors.

Q. Did you or did you not at any time indepen-

(Deposition of C. H. Kinney.)

dently and not in behalf of some jobber in the State of Idaho attempt to sell or sell to any individual grower any products of Cummer-Graham? What I am trying to ask, in making sales, were you helping the jobber to make sales or were you trying to make them independently of the jobbers?

A. I try to help the jobbers. We have to pay them anyway.

Q. You do, while in that state, render all assistance possible to increase their sales?

A. Yes, I render all the assistance possible to help them out.

Re-Direct Examination

By Mr. Stewart:

Q. Mr. Kinney, when you are in Idaho, doing this special work in connection with the jobber or distributor for Cummer-Graham, you are acting at that time in behalf of Cummer-Graham, are you not? A. I work for Cummer-Graham.

Q. And your salary and expenses during the time spent in Idaho are paid by Cummer-Graham Company? A. Yes indeed.

Q. Now Mr. Kinney, you don't mean to say that if you are in Idaho and want to divert a car that you have to get in touch with the Paris office and they have to call a meeting of the Board of Directors and authorize you to divert that car, do you?

A. I would say that I don't know whether they call a meeting of the board of directors. They have

(Deposition of C. H. Kinney.)

some of the directors meet to pass upon whatever was involved. If it was a new account, for the credit it might take. If that should come up, yes, we would have to go that route. [65]

Q. Mr. Kinney, do you not frequently use your own judgment in connection with the diversion of these cars? A. It isn't necessary.

Q. Well don't you frequently divert these cars without calling anyone?

A. These cars in Idaho are charged to the jobber and the diversion instructions are generally for his customer.

Q. But what I mean, Mr. Kinney, is that if some of the roller cars are started from Paris, Texas to Nampa, Idaho with Cummer-Graham Company as the consignor and Cummer-Graham as the consignee and you sell a car to a customer of one of the jobbers whose credit you know by experience is satisfactory, then is it not a fact that you use your own judgment and direct the railway company to divert that car to the customer?

A. Not without the approval of the jobber.

Q. Assuming then that you get the approval of the jobber, is it necessary that you get in touch with the office at Paris, Texas and get the approval of the Board of Directors of the company?

A. No. It has all been approved, the sale to the jobber.

Q. Then insofar as the interest of the Cummer-Graham Company is concerned, this particular fea-

(Deposition of C. H. Kinney.)

ture in connection with the sale of products shipped in roller cars is left up to your judgment, together with the judgment of the jobber in Idaho, is it not?

A. I don't say it is left to my judgment. Many of these answers are set before you start.

Q. Now if roller cars are shipped to Nampa, Idaho with Cummer-Graham Company as the consignor and Cummer-Graham Company as the consignee, why is it necessary that you invoice these particular cars to some jobber in Idaho?

A. Because they are invoiced to Cummer-Graham, care of different jobbers. They are billed that way.

Q. Do you in every instance have to get the jobber's approval before the cars can be diverted? [66]

A. I don't know that answer. You are asking about the things that don't come up in our regular course of business.

Q. Well, as a matter of fact, Mr. Kinney, what you are really interested in is the sale of Cummer-Graham products in Idaho?

A. That's right—not in Idaho—every place.

Q. Or in any other state for that matter?

A. That's right, the sale of Cummer-Graham products.

Q. And in shipping these roller cars with Cummer-Graham as the consignor and Cummer-Graham as the consignee, isn't it a fact that you are simply trying to get so many additional products on the ground during the harvest where you are

(Deposition of C. H. Kinney.)

able to make a quick sale of these products to persons having a demand for the products?

A. It is not often that. It is more of being able to service a deal according to the best interests of your customers and their customers, but lots of times in fresh fruit deals, they don't know today just when they are going to need their products—things ripen faster or slower and it is a service deal more than anything else.

Q. Isn't your presence necessary in Idaho during a portion of the harvest from that same standpoint, namely, service?

A. No. In fact we are spending less and less time in the territories.

Q. Mr. Kinney, are you familiar with the conveyance which was made on February 14, 1941, by F. H. Hogue to C. N. Kinney of nine different pieces of property in Payette County, Idaho?

A. Somewhat.

Q. Can you state what was the consideration for that conveyance?

A. To C. N. Kinney you are speaking of?

Q. Yes, the conveyance from F. H. Hogue to C. N. Kinney. What was the consideration of that?

A. Named in the Trustee's agreement?

Q. Or not named in the Trustee's agreement.

A. I don't know. I think it was a dollar or however those agreements are drawn. I really wouldn't know. I think I read it at the time. [67]

Q. Without taking into consideration whatever

(Deposition of C. H. Kinney.)

consideration was mentioned in the conveyance, state if you know what was the actual consideration.

A. I don't know, if there was any.

Q. State whether or not any part of the consideration in this conveyance from F. H. Hogue to C. N. Kinney dated February 14, 1941 was the cancellation of all or any part of an indebtedness of F. H. Hogue to the Cummer-Graham Company?

A. No. Cummer-Graham Company aren't in it anywhere.

Q. But I believe you did state that C. N. Kinney held the property as trustee for the creditors of F. H. Hogue. A. Um-huh.

Q. And you also stated that Cummer-Graham Company was not a creditor of F. H. Hogue at that time. A. That's right.

Q. Did Cummer-Graham Company ever transfer any indebtedness due them by F. H. Hogue to anyone else, if you know?

A. I don't know.

Q. And I believe you also stated that upon the death of your father, C. N. Kinney, that the court in Idaho ordered the transfer of this orchard property to Scott Brubaker, Trustee and that Mr. Brubaker is also trustee for the creditors of F. H. Hogue.

A. Right. Now I make that statement as having been told to me and I take it for granted. I haven't seen the papers or the court orders or anything of that kind. I am repeating what I have been told.

MR. A. V. KINNEY,

having been duly sworn, testified as follows:

Direct Examination

By Mr. Ned Stewart, Attorney for Plaintiff:

Q. Your name is A. V. Kinney?

A. That's right.

Q. And where do you live Mr. Kinney?

A. Pittsburg, Tex.

Q. Are you connected in any capacity at the present time with the Cummer-Graham Company?

A. No sir.

Q. Have you at any time ever been connected with the Cummer-Graham Company?

A. Yes.

Q. When?

A. From I believe about November '38 until December 31, 1940.

Q. In what capacity during that period of time were you connected with Cummer-Graham?

A. Salesman.

Q. As such salesman, Mr. Kinney, did you do any work in the State of Idaho? A. Yes.

Q. Just explain briefly what work you did for Cummer-Graham Company in the State of Idaho.

A. General sales work in connection with our dealers in Idaho and sales promotion work for promotion of use of Cummer-Graham Company products.

Q. I believe at the present time you are connected with the F. E. Prince Company of Pittsburg, Texas, is that correct?

(Deposition of A. V. Kinney.)

A. That's right, yes sir.

Q. Now does the F. E. Prince Company ship any of its products direct to Idaho or does the F. E. Prince Company sell through the Cummer-Graham Company? A. Neither.

Q. Does F. E. Prince Company have any customers in the State of Idaho?

A. This past year they have not.

Q. Did you while you were connected with the Cummer-Graham Company and working in Idaho call on the owners of the different orchards in Idaho in connection with promoting the sale and use of Cummer-Graham products?

A. I called on all shippers and anyone that might possibly use any of the products manufactured by Cummer-Graham. [69]

Q. During the time you were connected with the Cummer-Graham Company did you ever have an office in Idaho? A. Yes.

Q. Where was this office?

A. It was in the Reilly-Atkinson warehouse in Payette.

Q. And approximately how long did you maintain that office in any one year?

A. Not over three months.

Q. Was all of the business of Cummer-Graham Company in which you were interested conducted from that particular office while you were there?

A. No sir.

Q. Was part of the business conducted from that office? A. Part of it, yes sir.

(Deposition of A. V. Kinney.)

Q. Now while you were in Idaho and in the employ of the Cummer-Graham Company, Mr. Kinney, did you have authority to divert roller cars? A. No.

Q. Did you ever divert any roller cars?

A. Yes, through the authority of the sales manager.

Q. And who was the sales manager?

A. C. H. Kinney.

Q. Were these roller cars shipped by Cummer-Graham Company at Paris, Texas to Cummer-Graham Company at Nampa, Idaho or any other points in Idaho?

A. In care of one of the dealers that we had.

Q. And on authority of Mr. C. H. Kinney, Sales Manager, you diverted some of those cars in Idaho?

A. Yes, to customers of our representative or dealer or broker, whichever term you use.

Q. Were there times Mr. Kinney when you and your brother, C. H. Kinney, were both in Idaho at the same time? A. Yes.

Q. Were you there in the capacity of salesman for Cummer-Graham Company? A. Yes.

Q. And was Mr. C. H. Kinney there in the capacity of sales manager for Cummer-Graham Company?

A. To the best of my knowledge. [70]

Q. Mr. Kinney, are you personally acquainted with the officials of the Simms Fruit Ranch at Houston, Idaho?

(Deposition of A. V. Kinney.)

A. I don't know what you mean by the officials.

Q. Any of the officials or persons who have charge of the operation of that ranch.

A. Yes.

Q. Was the Simms Fruit Ranch at Houston, Idaho one of Cummer-Graham's distributors in Idaho while you were working for Cummer-Graham? A. They were at one time.

Q. Does not the Simms Fruit Ranch also own and operate extensive orchards in that territory?

A. Yes.

Q. Now were you acquainted with a Mr. Marquardsen who lived near Buhl, Idaho?

A. Yes.

Q. Was he a distributor of the Cummer-Graham Company? A. No sir.

Q. So far as you know did Cummer-Graham ever sell him any of their products direct?

A. No sir, they did not, so far as my knowledge. Only through Reilly-Atkinson Company.

Q. Are you acquainted with John Hoover, at Council, Idaho? A. Yes.

Q. Was he a distributor for Cummer-Graham Company products during the time you were in the employ of Cummer-Graham? A. No.

Q. Are you acquainted with Harry Heller at Filer, Idaho? A. Yes.

Q. Was he a jobber or distributor for Cummer-Graham Company products?

A. Well that is rather a difficult question to

(Deposition of A. V. Kinney.)

answer just in that way. The best of my knowledge, he was part of the organization of Reilly-Atkinson Company.

Q. Does Mr. Heller not own and operate certain orchards property in Idaho? A. Yes.

Q. Does not John Hoover own and operate certain orchards property in Idaho? A. Yes.

Q. Mr. Kinney, state if you know approximately how many customers Cummer-Graham Company had in Idaho, just approximately.

A. Well that depends on what you call a customer. Do you call a customer, customers of our dealers in Idaho our customers?

Q. That's right, including customers to whom your *dealers*—— [71]

A. Through our dealers we had many connections. I imagine around twenty or twenty-five, something like that.

MR. A. C. MACKIN,

being duly sworn, testified as follows:

Direct Examination

By Mr. Ned Stewart, Attorney for Plaintiff:

Q. Mr. Mackin, I believe your initials are A. C.

A. That's right.

Q. And you are Secretary and Treasurer of the Cummer-Graham Company? A. Yes sir.

Q. How long, Mr. Mackin, have you occupied that position with Cummer-Graham Company?

(Deposition of A. C. Mackin.)

A. Since 1931.

Q. As such Secretary-Treasurer do you have charge of the books, records and accounts for the Cummer-Graham Company? A. I do.

Q. Mr. Mackin, you were present when Mr. C. H. Kinney, Sales Manager for Cummer-Graham Company testified and you heard his testimony with reference to the time spent in Idaho?

A. I did.

Q. During the time Mr. C. H. Kinney was in Idaho, did he ever mail to the Paris office of Cummer-Graham Company any checks or remittances that he collected while in Idaho?

A. I don't recall any this year.

Q. Do you recall any during the year 1941?

A. There might possibly have been some small remittances. I can't be certain about that. It was so unusual that I can't remember of it happening.

Q. Well let me ask you this question. Does Mr. C. H. Kinney make collections in the various territories in which he works?

A. It depends upon the territory.

Q. Well does he have authority from Cummer-Graham Company to collect in any territory?

A. We frequently direct him to do so. [72]

Q. Do you recall ever having directed him to collect anything in the State of Idaho?

A. We have told him to contact our dealers at various times and have them send us in some remittances.

(Deposition of A. C. Mackin.)

Q. Now while Mr. C. H. Kinney is in Idaho, does he from time to time send in orders to the Paris, Texas office of Cummer-Graham Company for the products manufactured by Cummer-Graham Company?

A. Usually our orders come from the dealers.

Q. To the best of your knowledge has Mr. C. H. Kinney ever sent in any order from Idaho?

A. I don't recall any from Idaho.

Q. Mr. Mackin, state, if you know, just what Mr. C. H. Kinney does during the time he spends in Idaho for Cummer-Graham Co.

A. His work is the general work of securing sales, contacting the dealers, jobbers or whatever you call them, and assisting them wherever he can.

Q. Are all of your shipments into the State of Idaho made through some jobber or distributor?

A. Yes sir, to the best of my knowledge.

Q. Do you recall ever having shipped any grower of fruit direct who was not a jobber or distributor of Cummer-Graham Company?

A. No sir I can't recall it. I am not too familiar with the terms of jobber or dealer. Usually they follow the Straight Side Basket Company's prescribed list.

Q. Now are you familiar Mr. Mackin with what they call the so-called roller car movement?

A. Fairly well.

Q. Were certain cars from time to time in 1940 and 1941 shipped by Cummer-Graham Company of

(Deposition of A. C. Mackin.)

Paris, Texas to Cummer-Graham Company in care of some jobber at some particular point in Idaho?

A. On that point, I don't recall a single car that went out in 1941 that was consigned to Cummer-Graham Company without there being either Reilly-Atkinson's or F. C. Hogue's name on the bill of lading, shipped in care of them, and it is [73] my recollection that practically every bill of lading was consigned direct to Reilly-Atkinson or F. C. Hogue at Nampa, as the case may be, without Cummer-Graham appearing as the consignee. There may have perhaps been a few cars shipped the other way but I don't at present recall a particular one.

Q. But if Cummer-Graham Company was both the consignor and the consignee, then the shipments were billed Cummer-Graham Company in care of some particular jobber in Idaho?

A. Yes sir.

Q. Now Mr. Mackin after those shipments reached Idaho, were they frequently diverted?

A. Quite frequently.

Q. And who had authority to divert those shipments?

A. Those diversions were usually handled from the Paris office if Reilly Atkinson Company himself did not handle them. The papers were all sent to Reilly Atkinson Company or F. C. Hogue as the case may be.

Q. Did Mr. C. H. Kinney while he was in Idaho actually direct any of the diversions?

(Deposition of A. C. Mackin.)

A. I don't know of any case.

Q. So far as you know Mr. Mackin, did C. H. Kinney while he was in Idaho have authority to divert any of those cars?

A. No sir.

Q. Do you know of your own personal knowledge whether he did actually divert any or not?

A. No sir, I do not. I am not that familiar with Reilly Atkinson Company or F. C. Hogue's arrangements.

Q. Now Mr. Mackin, assuming that you sell some dealer or jobber in Idaho more baskets during a particular harvest season than he could sell and this jobber or dealer had to carry over these baskets, does Cummer-Graham agree, if requested, to also carry over that part of the jobber's or dealer's account which is equal to the quantity of baskets which the dealer or jobber is carrying over for the season? [74]

A. We have never necessarily agreed to carry them over but sometimes we have carried them over when they have requested it.

Q. Then during the following season when final settlement is made in connection with the carry-over baskets, does Cummer-Graham Company take into consideration in connection with the final settlement the matter of insurance and of storage charges on these baskets from one season to another by the jobber or dealer in Idaho? A. No sir.

Q. Then there is no discount or decrease in the

(Deposition of A. C. Mackin.)

original prices on account of the jobber or dealer carrying insurance or paying storage charges?

A. No sir, none whatsoever.

Q. Mr. Mackin do you frequently have carry-over baskets in Idaho? A. We have, yes sir.

Q. And does Cummer-Graham Company take out any insurance on these carry-over baskets?

A. No sir.

Q. Does the jobber or dealer in Idaho take out insurance with a loss payable clause in favor of Cummer-Graham Company?

A. There may be some instances of it but I haven't seen the policy.

Q. Now when Cummer-Graham Company ships its products to the Reilly Atkinson Company, is there an understanding between Cummer-Graham and Reilly Atkinson prior to the shipments as to what price these products will be invoiced to the Reilly-Atkinson Company for? A. Yes sir.

Q. Does the Reilly-Atkinson Company actually know at the time the shipments are made what the price figure is invoiced at?

A. Yes, they receive our invoice covering each shipment.

Q. Assuming that your company would ship ten cars of baskets to one of your jobbers or distributors in Idaho at some agreed price, say 1.85 a dozen, and this jobber or distributor had five cars of these baskets left over at the end of the season and you carried his account until the following season on

(Deposition of A. C. Mackin.)

those five cars of baskets and they were sold the subsequent season, does your company still collect the $1.85 a dozen from that jobber for those baskets? A. There have been times, yes sir. [75]

Q. Well I mean does it follow that general practice or custom? A. Yes sir.

Q. Do you know of any times when there has been a decrease in the price of carry-over baskets?

A. Yes, I do.

Q. What factors govern whether or not you will collect the price for which the baskets were originally sold or whether there shall be a decrease in the price, if they are carried over until the following season?

A. That would depend upon the arrangement that Reilly Atkinson Co. would make with us.

Q. Now when would they make that arrangement?

A. Usually it is made in late spring or early summer.

Q. Is it in writing? A. It has been.

Q. Was the arrangement you had with Reilly-Atkinson Company for the 1941 season in writing?

A. I am not certain of this situation for 1941. I believe it was a continuation of a prior arrangement.

Q. Mr. Mackin, will you make an effort to find whatever instrument in writing there was between Cummer-Graham Company and the Reilly-Atkinson Company which was executed at any time but which

(Deposition of A. C. Mackin.)

was in effect during the 1941 season, and identify a copy of that instrument as Exhibit A to your testimony and furnish the reporter with same?

A. Yes I will.

Q. Now Mr. Mackin, does Cummer-Graham Company have certain consignment contracts with its jobbers or distributors in Idaho?

A. The only contracts we would have in that connection would be the written contract that we are trying to locate.

Q. Who pays the freight on the shipments of baskets and other products by Cummer-Graham to these dealers or distributors in Idaho?

A. The jobbers and dealers pay the freight.

Q. Is it paid by Cummer-Graham at this end of the line and then charged to them? [76]

A. No, they pay it on the other end of the line and deduct it from their settlement.

Q. Now Mr. Mackin, are you an officer of the Veneer Products Company? A. I am.

Q. What is your official position with the Veneer Products Co.? A. Secretary-Treasurer.

Q. Does the Cummer-Graham Company own any of the Veneer Products Company stock?

A. No sir.

Q. Does anyone acting as Trustee for the Cummer-Graham Company own any of the Veneer Products Company stock? A. No sir.

Q. Then the Cummer-Graham Company has no interest whatever, directly or indirectly or through

(Deposition of A. C. Mackin.)

a trustee in the ownership of the Veneer Products Company? A. No sir.

Q. Now are you familiar with the situation during the time the Basket Sales Company of Dallas was operating with reference to one of its customers or distributors F. H. Hogue of Idaho?

A. I am familiar with the Basket Sales Company but I don't know much, if anything, about its relationship with Hogue.

Q. Did the Cummer-Graham Company purchase any notes or accounts receivable of F. H. Hogue from the Basket Sales Company? A. No.

Q. Did F. H. Hogue, during 1940 or 1941 owe Cummer-Graham Company anything?

A. No.

Q. I believe the records in Idaho show, Mr. Mackin that on February 14, 1941 F. H. Hogue conveyed to C. N. Kinney nine different pieces of orchard property in Payette County, Idaho. Did Cummer-Graham Company at that time have any interest whatever in the particular orchard property conveyed? A. None that I know of.

Q. Do your records as Secretary and Treasurer of Cummer-Graham Company reflect that C. N. Kinney was at that time or has at any time subsequent thereto acted in the capacity of Trustee for Cummer-Graham Compay in connection with this orchard property or any other orchard property in Idaho? A. No sir. [77]

Q. Do you in you capacity as Secretary and

(Deposition of A. C. Mackin.)

Treasurer of Cummer-Graham Company know anything whatever about the actual consideration for the conveyance by F. H. Hogue to C. N. Kinney of the nine different pieces of orchard property in Payette County, Idaho in February 1941?

A. No.

Q. Was there any entry whatever made on the books of Cummer-Graham Company in connection with this conveyance? A. No.

Q. Now Mr. Mackin, does Cummer-Graham either directly or indirectly own any orchard property or any other property in the State of Idaho?

A. It does not.

Q. Does the Cummer-Graham Company now or have they at any time in the past *have* any interest whatever in the F. H. Hogue orchards property in Idaho? A. None.

Q. In February 1941, state whether or not C. N. Kinney was employed by the Cummer-Graham Company? A. He was not.

Q. Was Mr. C. N. Kinney ever employed by the Cummer-Graham Company? A. Never.

Q. Mr. Mackin, in the event you are unable to locate the contract with the Reilly-Atkinson Company, will you attempt to locate any contract with any jobber or dealer in Idaho and introduce into the record a copy of this contract and identify same as Exhibit B to your testimony and furnish the reporter with a copy? A. Yes, I will.

Q. Now on October 30, 1941, when Mr. C. H.

(Deposition of A. C. Mackin.)

Kinney was served with Summons in this case at Payette, Idaho, he was in the employ of the Cummer-Graham Company at that time?

A. He was.

Q. Do other representatives of the Cummer-Graham Company frequently go to Idaho in connection with the business of Cummer-Graham in that state? A. Oh, rather infrequently. [78]

Cross-Examination

By Mr. Fisher:

Q. Mr. Mackin, have you stated that you are a director of Cummer-Graham Company?

A. I don't know whether I have stated it or not, but I am.

Q. You have stated that you were Secretary-Treasurer of the company. A. That's right.

Q. Did you hold such office on October 30, 1941?

A. I did.

Q. Were your a director of the company on that date and prior thereto? A. I was.

Q. You stated that Mr. C. H. Kinney on such date was an employee of Cummer-Graham Company. Please state in what capacity he was employed. A. Sales Manager.

Q. How long had he held such position prior to that time or approximately how long?

A. Approximately three years.

Q. Was or was not Mr. C. H. Kinney on October 30, 1941 a director of Cummer-Graham Company?

(Deposition of A. C. Mackin.)

A. He was not.

Q. Was or was not he on such date an officer of Cummer-Graham Company? A. He was not.

Q. Had he on that date any authority in connection with the management of Cummer-Graham Company and its affairs? A. None.

Q. On that date did or did not he have any authority from Cummer-Graham Company, other than the privilege as sales manager, to take orders for products of the company, subject to acceptance by the company acting through its directors or a proper officer?

A. That was his sole authority and work.

Q. None other? A. None other.

Q. Had he the authority to accept orders himself for the company or was it necessary that the orders be accepted by an officer of the company or the directors?

A. All orders are to be approved by the Paris office.

Q. When in that office and not out on the territory, did he have authority to accept them or was it necessary for some officer of the company to accept them?

A. It was necessary for an officer of the company to accept them. [79]

Re-Direct Examination

By Mr. Stewart:

Q. Mr. Mackin, when the summons was served

(Deposition of A. C. Mackin.)

on Mr. C. H. Kinney on October 30, 1941 at Payette, Idaho, Mr. Kinney was at that time representing Cummer-Graham Company in his official capacity as Sales Manager?

A. He was representing them in his capacity as Sales Manager, yes.

Q. And he was there on the time and expense of the Cummer-Graham Company? A. He was.

Q. And he was there looking after the business of the Cummer-Graham Company?

A. He was there fulfilling the duties of his office.

Q. And is it not a fact that Mr. C. H. Kinney remained in Idaho for some short period of time during the harvest season in connection with sales and promotional work for Cummer-Graham?

A. Yes, he was in Idaho a while this past fall. I don't know just how long.

Q. Does he not call on the trade and jobbers in Idaho and do any and everything necessary while he is there to promote the sale and use of the products manufactured by Cummer-Graham Company?

A. I believe those are some of his duties.

Q. And if some jobber or distributor is a little bit behind on his account I believe you stated that you or someone in the office would write a letter to Mr. C. H. Kinney in Idaho or in some other state where he might be to call on that jobber or distributor with the view in mind of adjusting a delinquent account or asking the jobber to remit for a delinquent account?

(Deposition of A. C. Mackin.)

A. We at times requested that he do that. More frequently we will write a letter to the jobber in question and send Mr. Kinney a copy of the letter.

Re-Cross Examination

By Mr. Fisher:

Q. Mr. Mackin, as Secretary-Treasurer and an officer of Cummer-Graham Company, please state whether or not Mr. Kinney has at any time as a representative of Cummer-Graham Company as Sales Manager or in any other capacity been authorized to make any remittances of any amount owing by any customer [80] to such customer, or in any manner adjust any account owing by any customer, by collecting a sum of money less than the full amount owing?

A. No, we have never directed him to undertake any such adjustment as that.

Q. You were asked something about his being privileged or it being a part of his job to adjust accounts, is the reason that question was asked, and I would like for you to state definitely now whether or not at any time he had any such authority?

A. The adjustment angle escaped me and it was purely a question of payment which we had in mind.

Q. Now state definitely whether or not Mr. Kinney at any time had authority to adjust any account between Cummer-Graham Company and any of its customers in any state? A. He has not. [81]

MR. C. H. KINNEY,

recalled for further examination by Mr. Stewart:

Q. You are the same C. H. Kinney who previously testified in this case? A. I am.

Q. Mr. Kinney, do you know any of the officials or any of the people who are in charge of the Simms Fruit Ranch of Houston, Idaho?

A. I know the Simms boys, if that is whom you mean.

Q. Do they own and operate this orchard?

A. They operate it. Whether it is a corporation or partnership, I am not sure.

Q. Now do you know a Mr. Marquardsen who lives near Buhl, Idaho? A. Very well.

Q. Have you in your capacity as Sales Manager for Cummer-Graham Company ever sold any of the Cummer-Graham products to the Simms Fruit Ranch or to Mr. Marquardsen?

A. Yes, through Reilly-Atkinson Company.

Q. Do you recall having collected an account from Mr. Marquardsen while you were in Idaho at any time?

A. I don't recall. I may have.

Q. Now are either the Simms Fruit Ranch or Mr. Marquardsen jobbers or wholesale distributors for Cummer-Graham Company?

A. Marquardsen is not, although I believe Marquardsen was on the Straight Side dealers' list one year. I won't say for sure about that. I think Simms has been on the dealers' list several years.

Q. Now Mr. Marquardsen owns and operates his own orchard property in Idaho, does he not?

(Deposition of C. H. Kinney.)

A. Yes.

Q. Now have John Hoover of Council, Idaho or Harry Heller of Filer, Idaho ever been jobbers or wholesale distributors for Cummer-Graham Company?

A. John Hoover has not, although I think possibly we have sold him some time in the past. Harry Heller has been I think always on the Straight Side Dealers' list but he is handled through Reilly-Atkinson as a sub-dealer of Reilly. [82]

Q. Was F. H. Hogue of Payette, Idaho a jobber or distributor for Cummer-Graham at any time?

A. Not to my knowledge.

Q. Now isn't it true that the Simms Fruit Ranch, Mr. Marquardsen, John Hoover, Harry Heller and F. H. Hogue were all growers as well as packers of fruit?

A. Yes, I think that's right. I think almost anyone who uses a carload of baskets in Idaho is such.

Cross-Examination

By Mr. Fisher:

Q. On your examination by Mr. Stewart reference was made to Straight Side Basket list. Please state what the Straight Side Basket List is.

A. In past years, prior to I think about June 1940—I might be wrong on the date—Straight Side Basket Corporation published a fair market price list and a list of accredited dealers in baskets who were entitled to a dealer's discount. Now if I have the date correct, about June 1940 or the time they cancelled their fair market price schedule, this list

(Deposition of C. H. Kinney.)

was abandoned and then the dealers and jobbers were designated according to the ——— as adopted by each individual factory.

Q. Did or did not Straight Side Basket Company require or attempt to require anyone using any machine belonging to it under a license to sell only to the dealers appearing on that list?

A. No. They allowed you to sell to anyone, but the dealer's discount could only be given to the dealers shown on that list.

Q. Did or did not the dealers' discount list referred to receive any consideration in the settlement between the Straight Side Basket Corporation and their licensees?

A. Yes, the payment of royalty was based on the delivered price of baskets and that delivered price was less to the listed dealers than it was to those not listed. [83]

State of Texas
County of Lamar

I hereby certify that the above and foregoing depositions of C. H. Kinney, A. V. Kinney and A. C. Mackin, were taken by me in shorthand and transcribed by me, and are true and correct, to the best of my ability.

Witness my hand and seal at Paris, Texas, on this the 27th day of February, 1942.

[Seal] H. M. SMITH
Notary Public in and for
Lamar County, Tex. [84]

[Title of Court and Cause.]

DEPOSITIONS

Depositions of Frederick C. Hogue, F. H. Hogue, Scott Brubaker, J. C. Palumbo, and R. H. DeHaven, witnesses on behalf of the plaintiff in the above entitled cause, taken before Frank J. Kester, a Notary Public in and for the State of Idaho, on Tuesday, March 17, 1942, commencing at the hour of 10:00 A. M., in the office of Frederick C. Hogue in Payette, Payette County, Idaho, pursuant to the attached stipulation of counsel.

Appearances:

For the Plaintiff:

RICHARDS & HAGA,

Attorneys-at-Law, of Boise, Idaho,

Appearing by and through

J. L. EBERLE, ESQ.

For the Defendant:

FREDERICK P. CRANSTON, ESQ.,

of Denver, Colorado; and

GEORGE DONART, ESQ.,

of Weiser, Idaho

Appearing by and through

GEORGE DONART, ESQ. [85]

Whereupon, at said time and place, and following some discussion and delay while waiting for witnesses, the following proceedings were had, to wit:

Morning Session
11:05 o'clock
Tuesday, March 17, 1942

FREDERICK C. HOGUE,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Will you state your name to the reporter?

A. Frederick C. Hogue.

Q. And quite often write your name as "F. C. Hogue"? A. Yes.

Q. And what is your business, Mr. Hogue?

A. Merchandise broker.

Q. Handling what type of commodities?

A. Mostly shippers' supplies.

Q. Are you doing business with Cummer-Graham Company, a corporation, whose main office is in Paris, Texas? A. Yes.

Q. How long have you been doing business with Cummer-Graham Company?

A. Oh, since about 1939.

Q. About what time in 1939?

A. Probably April, May.

Q. And what is the nature of that business, Mr. Hogue?

(Deposition of Frederick C. Hogue.)

A. Selling packages, fruit packages.

Q. Selling fruit packages for Cummer-Graham Company?

A. Well, I—they ship me packages, and I sell them. [86]

Q. (By Mr. Eberle) Now, do you have a territory in which you do this selling for them?

A. Well, it's mostly done in Idaho.

Q. You have no definite territory that's your selling territory?

A. No. No, I wouldn't say there was.

Q. And is there any limitation as to the type of packages that you handle for them?

A. No.

Q. Now, Mr. Hogue, just what is your procedure in handling their business, in reference to keeping a record of the business you handle for them?

A. Well, I sell these bushel baskets or half-bushel baskets and pea tubs, and they ship them up here, and I deliver them and invoice for them and collect for them.

Q. What record do you keep as to your transactions for Cummer-Graham Company?

A. Well, I keep a record on each car of packages.

Q. Well, now, what is the nature of that record? Is it a journal or a ledger sheet, or what is the nature of it?

A. I can't say that; I don't know.

Q. Well, have you a sample of how you keep that record, so we can see just what records or checks you keep of it? A. Yes.

(Deposition of Frederick C. Hogue.)

Q. Have you got it handy here, so we can just see how you keep the record?

A. You mean just the car file?

Q. Well, what record you keep of your business with Cummer-Graham, just the mechanics.

(After some search through his files, [87] the witness produces a document and hands it to counsel.)

A. I don't know just what you want there.

Q. (By Mr. Eberle) Now, the only records you keep is a file on each sale? Is that your record?

A. Well, you see here is a car shipped to me, and they invoice that to me, and I sell the car and reinvoice it, and I pay them—like this letter here (indicating). See? That's where I paid for the car.

Q. In other words, you have a file on each car; is that it? A. Yes.

Q. Showing the invoice, the bill of lading, and your correspondence? A. Yes.

Q. All right. And you don't have any—you don't make any entries of these on your journal or ledger, so far as Cummer-Graham are concerned?

A. Well, I don't know about that. I don't know much about the book part of it.

The Witness: (to Mr. Brubaker) Do you?

Mr. Scott Brubaker: No.

The Witness: I guess we will have to get that from the bookkeeper.

Q. So far as you know now, you just keep a file

(Deposition of Frederick C. Hogue.)
on each car, showing your invoices, bill of lading, and correspondence?

A. In the file, yes; but getting back to the books, the part that would go in the books would be their invoicing us and our reinvoicing whoever they were sold to. [88]

Q. (By Mr. Eberle) That's what I was getting at. Have you got the books where those entries are made? A. Yes, I think so.

(After some search through his files, the witness produces a book, which he and counsel examine.)

Mr. Eberle: Perhaps we can save time by looking for that during the noon hour.

The Witness: Yeah. Anyway, copies of my invoice to whoever I sold it to would be in here.

Q. (By Mr. Eberle) Now, Mr. Hogue, you have an agreement, have you, with Cummer-Graham Company, as to your commissions in connection with these sales? A. Yes.

Q. Is the one, the agreement you now have, the same as the one you started with in 1939?

A. I believe it is.

Q. Have you that here, so we could see what the date of that is? A. Uh, huh.

(Witness makes some considerable search of his files and records.)

The Witness: I guess I will have to locate that during the noon hour.

(Deposition of Frederick C. Hogue.)

Q. Now, you think that that contract was made some time in '39, to start with?

A. Well, this last one—let's see, the last one would be—the last one would be '40, I believe.

Q. Oh, I see.

A. '40 to '41, '41 to '42. [89]

Q. (By Mr. Eberle) Did you have a contract, then, in '39?

A. One in '39 and one in '40. It would be just the two.

Q. You didn't make one in '41?

A. '39 to '40, and '40—I don't believe so.

Q. Will you check that, also, during the noon hour? A. Yes.

Q. Were these contracts signed here in Idaho?

A. Well, my part of it was signed here in Idaho.

Q. And with whom did you deal in negotiating for these contracts? A. Herbert Kinney.

Q. That's C. H. Kinney? A. Yes.

Q. Did he approach you, or did you approach him? A. You mean at the start?

Q. Yes, in 1939.

A. Well, I just couldn't say on that.

Q. But you negotiated with him——?

A. (Interposing) Yes.

Q. (continuing) ——about representing the company here in these sales? A. Yes.

Q. And did you discuss the terms of the contract with him? A. Yes.

Q. And so, likewise, with the other contracts?

(Deposition of Frederick C. Hogue.)

A. Yes.

Q. Now, when orders are sent in by you, Mr. Hogue, just what are the mechanics of that, or your practice in sending [90] the orders in? Do you have some form, or how do you do it?

A. Well, if I sell something, I will usually wire them to ship me so-and-so,—ship a car of baskets to Payette, or Fruitland.

Q. (By Mr. Eberle) Now, where your orders are not telegraphic, do you have any form of order that you send in to them?

A. Well, I could write a letter.

Q. Do you have any printed form that you use?

A. You mean an order book?

Q. Yes. A. Yes.

Q. Now, could we see what those orders are like?

(After some search through his files, the witness produces a book and hands it to counsel.)

A. Here is one.

Q. Now, could I take one out of here as an exhibit, without ruining the book? A. Yes.

Q. Would this one be all right, here (indicating)? A. I think it would.

(Whereupon, a blank sales order from the witness' book was marked, "Plaintiff's Exhibit 1 for Identification.")

Q. Now, Mr. Hogue, handing you this Plaintiff's Exhibit 1 for Identification, I will ask you if that is the order blank that you mentioned?

(Deposition of Frederick C. Hogue.)

A. Well, this a Cummer-Graham order blank.

Q. Now, do you use that blank in sending in orders to Cummer-Graham? [91]

A. Some orders; not all orders.

Q. (By Mr. Eberle) But some of your orders are sent in on this blank marked Plaintiff's Exhibit 1? A. Yes.

Q. Now, Mr. Hogue, at the end of the year do you have a settlement with Cummer-Graham as to your commissions?

A. Well, when I sell a car of, say, baskets, they invoice me on the car of baskets and then when I have collected or even if I haven't collected it,—when I pay them for that car of baskets I deduct the commission I have earned, and then I pay them. So that's how it is taken care of; so there isn't any annual settlement; it rather takes care of itself.

Q. In other words, when you send the money in for merchandise invoiced to you on a certain invoice, you deduct the commission, do you, on a certain contract? A. Yes.

Q. Now, in selling these baskets, or taking orders, Mr. Hogue, does Cummer-Graham Company give you an approved list of people you can sell to?

A. No.

Q. How do you determine the credit of any of the purchasers or subdealers or growers?

A. Well, that's up to me.

Q. You don't have to inquire of Cummer-Graham as to the rating of any of these subdealers?

(Deposition of Frederick C. Hogue.)

A. No. If I sold someone and they didn't pay for it, I would be stuck.

Q. Do you talk the matter of credit over with Mr. Kinney? [92]

A. Oh, not in a detailed manner. I might ask him about someone, you know.

Q. (By Mr. Eberle) As to a person's credit?

A. I might.

Q. Now, during these years that you have been doing business with Cummer-Graham Company, Mr. Hogue, Mr. Kinney—C. H. Kinney would be out here in the summer or fall of each year?

A. He usually comes out at least once a year.

Q. And during the time that he would be in Idaho, just what would he do?

A. Well, I really don't know just what he does. He calls on me, and he—I suppose he calls on Reilly Atkinson.

Q. Does he call on any growers or any of the customers that buy these baskets?

A. Yes, he said he did.

Q. And he would go around the territory calling on these various growers and subdealers?

A. I don't know so much about the growers. He would call on dealers. The baskets are resold, usually, by the dealers to the growers.

Q. Would you accompany him on these calls?

A. Well, I have accompanied him, calling on dealers.

Q. But not in calling on growers?

(Deposition of Frederick C. Hogue.)

A. I don't believe I have accompanied him calling on growers.

Q. So if he would call on growers, he would do that by himself? A. I believe so.

Q. So you would receive invoices for all of the sup- [93] plies you would order from Cummer-Graham Company? A. Yes.

Q. (By Mr. Eberle) About what would be the volume of that business for the last three years, or for 1939, '40, and '41?

A. I couldn't hardly answer that without checking it.

Q. Have you the invoices covering the sales that you made during '39, '40, and '41?

A. Our own invoices?

Q. No, I mean the invoices that would be sent you by Cummer-Graham.

A. Yes, I believe I have.

Q. Have you a list of them, or have you the invoices themselves?

A. Well, the invoices would be in each car file, probably.

Q. And would those invoices be to you, F. C. Hogue? A. Let's look one up.

(Witness examines some documents from his files.)

A. (continuing) Yes, F. C. Hogue. They will all be the same; they would be F. C. Hogue.

Q. In other words, as I understand you, all the invoices that you would get from the Cummer-Gra-

(Deposition of Frederick C. Hogue.)

ham Company would be made out to you, would be invoiced to you, F. C. Hogue? A. Yes.

Q. Now, of course you haven't found your contract, but in order to save a little time, do you get any commission under these contracts on a certain type of baskets, even though sold in this territory direct by Cummer-Graham Company? [94]

A. No. I make a commission on what I sell myself.

Q. (By Mr. Eberle) That's all? A. Yes.

Q. In other words, if Cummer-Graham Company, through Mr. Kinney, would make a sale to any grower or subdealer direct, and invoice it direct, you would get no commission on it?

A. That's right.

Q. Do you know how much Mr. Kinney sold to growers or subdealers that were invoiced to them directly and not to you, during the years 1939, 1940, and 1941? A. No.

Q. Well, put it this way: Could you give us the names of some of the sales that were made direct by Cummer-Graham Company to growers?

A. No, I don't know of any.

Q. Did you ever talk to anyone about any of these sales that were made direct to a grower or subdealer?

A. No, I never have. In other words, you see there's another agent here, Reilly Atkinson, and anything that I didn't sell I would assume he sold. I wouldn't know for sure.

(Deposition of Frederick C. Hogue.)

Q. I mean where the invoices were made, as you mentioned, direct to the grower and not to you. Do you know of any of those instances?

A. Well, would that be direct to grower, or dealer, or anyone?

Q. Yes. Invoiced direct to them.

A. The only cases I know of is one, and that is where I sold some pea tubs—I believe that's the only one—pea tubs to P. G. Batt at Wilder, and the invoicing of those pea [95] tubs, of which there were three cars, was invoiced direct from Paris, Texas, to P. G. Batt.

Q. (By Mr. Eberle) And how, then, would you collect your commission on those?

A. (No answer).

Q. Or did you collect a commission on them?

A. Well, the commission—I believe the way that worked, they sent P. G. Batt the original invoice and sent us a copy with the same figures on it, and he paid those direct; and we figured the commissions on the three cars from the copy of the invoice, and deducted those on a payment to Cummer-Graham for some other material.

Q. Now, have you any—I was referring to some subdealers. Who are your subdealers in this territory?

A. Well, most all of the—. There would be Parsons, is a dealer, Parsons Fruit Company; F. H. Hogue; and Frank B. Arata; and J. C. Palumbo; J. C. Watson; Gem Fruit Union; Fruitland Fruit Co-Operative. Now, those are some of the dealers.

(Deposition of Frederick C. Hogue.)

Q. Did Cummer-Graham sell direct to any of those dealers?

A. No, they wouldn't sell direct, as far as I know. In other words, anything those dealers got they would either buy through me or Reilly Atkinson, I suppose. I don't know of any instance where they sold direct, that I know about.

Q. And these would be the dealers that C. H. Kinney would call on and work with, that you mentioned?

A. Yes, those would be some of the dealers that buy the things.

Q. Now, what would Mr. Kinney do with reference to col- [96] lections?

A. Well, in my own case I know that he looks to me. In other words, when they sell something —I might sell a hundred carloads of baskets, and they might not know where any of them went, but they look to me for the money.

Q. (By Mr. Eberle) And then would he do anything about doing any of the collecting from any of the persons that purchased any of these baskets?

A. He never has.

Q. So far as you know? A. No.

Q. Now, Mr. Hogue, reference has been made in some of these depositions to roller cars. I assume you understand what they mean by that?

A. Yes.

Q. Now, how would you handle the roller cars in Idaho?

(Deposition of Frederick C. Hogue.)

A. Well, roller cars are when the season gets strong here, Texas is quite a ways from the consuming point, and it takes seven to ten days to get them up here; and a lot of people don't like to obligate themselves to buy until they know they need them; so in the past they have usually put out some roller cars between Texas and here, have them coming, you see; and then if I needed three cars I would take those that are on track, if I needed them quickly, and if I didn't, I would order them out; and I think they were handled the same way by Reilly.

Q. In other words, if you needed one of these roller cars, you would get in touch with Kinney?

A. Yes.

Q. And then you would arrange with him for taking that [97] particular car, or those cars, that you wanted? A. Yes.

Q. (By Mr. Eberle) As I understand your testimony, then, the purpose of these roller cars was that there were a number of these growers who didn't want to give orders or make purchases until they were ready for them?

A. Well, that would be my assumption of the reason.

Q. And the orders or sales wouldn't be made until after the roller cars were here?

A. Well, in transit here.

Q. And if the sale were, say, in Nampa, you would arrange with Mr. Kinney to use a certain number of those roller cars? A. Yes.

(Deposition of Frederick C. Hogue.)

Q. Now, when would you be invoiced for the car, then? Assume that the roller cars were in Idaho, and you notified Mr. Kinney that you wanted one or more of those cars: When would they be invoiced to you?

A. Well, the first thing I would get would be the car number, and the contents, so I would know how to make my billing, and then they would be invoiced right after—direct from Texas, immediately upon the reecipt of the information they got.

Q. Now, who would give them the information, you or Mr. Kinney, or both?

A. Well, Mr. Kinney, probably, if he was here.

Q. He would give them the information, and then they would invoice you? A. Yes.

Q. Would any of these roller cars be cars that you had [98] ordered on the basis of orders such as you have mentioned here?

A. How do you mean?

Mr. Eberle: Well, strike that question. We will try to rephrase it.

Q. (By Mr. Eberle) As I understand it, if you obtain orders from growers, you would order the merchandise from Cummer-Graham; is that correct? A. Yes.

Q. Now, the roller cars would not come in that class; is that true?

A. Well, that—that depends. In other words, I might have a stock of baskets here, and I would find that in two days' time maybe I could sell more

(Deposition of Frederick C. Hogue.)
than what my stock consisted of; so naturally the next thing I wanted to know was to find where I could find the nearest stock for immediate consumption; so naturally if I could find a car on the tracks that Reilly had ordered and found he didn't want, I would try to get that car to supply the difference.

Q. But when the car arrived here, it wasn't your property; you hadn't ordered the merchandise in that car, before its arrival?

A. It could be that way. It might be somebody else's car that I took. In other words, last year if Reilly had—oh, we would order, you see, and sometimes he would get in more than he could get rid of without getting on demurrage, and I might have use and take three or four of those; and the next week I might be a little heavy, and he would take them; so we kind of worked back and forth.

Q. Now, while it was on the track, it was a Cummer- [99] Graham car; is that true? And then when you, in order to save demurrage, would take it, then it would become your purchase; is that true?

A. Well, it would be correct unless that car was originally billed to me.—Of course you wouldn't figure that was a roller?

Q. (By Mr Eberle) Yes.

A. Yes, if I got hold of a car at Nampa, for example, it wouldn't belong to me until I had got the car and they had invoiced it to me.

Q. And in order to get it, you would probably take up with Mr. Kinney, if he was here, the matter

(Deposition of Frederick C. Hogue.)
of taking over that car, and he would notify Paris, and they would invoice it to you, and you would pay for it after you received the invoice; is that correct? A. Yes.

Q. Now, reference is also made in some of these depositions to sight draft cars. Did you have any of those?

A. You mean last year, or since I——?

Q. Yes, during the time you were doing business with Cummer-Graham.

A. Yes, I have had sight draft cars.

Q. Now, how would you handle those?

A. Well,—well, I will just give you an example: I sold some pea tubs in Joseph, Oregon, and they weren't—they were invoiced to me. I made it sight draft, myself, because I was a little bit afraid of the fellow I was selling them to, and so I put a sight draft on them at Nampa, so they couldn't get past Nampa without paying it. They would bill a car to me, and I would divert it and sight draft right here. [100]

Q. (By Mr. Eberle) But you had no cases where there was a bill of lading sight draft directed to the grower? A. No.

(Discussion of counsel, off the record.)

Mr. Donart: May I ask a few questions now?

Mr. Eberle: Yes, with the understanding that I can continue my direct examination.

Mr. Donant: Surely.

(Deposition of Frederick C. Hogue.)

Cross-Examination

By Mr. Donart:

Q. Now, just a few questions, Mr. Hogue: You stated that sometimes you would ask Mr. Kinney about different people's credit. Were you asking for information just like you would have made an inquiry anywhere else, or were you asking him because he was the representative of the company?

A. I was asking him just like I would ask anyone who might know. I might ask Brook Scanlon.

Q. It wasn't any agreement between you and Cummer-Graham that you must have the credit of your customer passed on before you can make the sale? A. No, I stand my own credit.

Q. Now, as I understand, on all your deals with Cummer-Graham, anything that you sell to a grower or subdealer is charged to you by Cummer-Graham?

A. Everything has been charged to me by Cummer-Graham, outside of that one exception I mentioned.

Q. That one exception over at Parma?

A. At Wilder.

Q. And then if you sell anything out to someone and are unable to collect for it, does Cummer-Graham hold you for [101] their price on those goods? A. Yes.

Q. (By Mr. Donart) Now, I want a little further information on these roller cars. As I un-

(Deposition of Frederick C. Hogue.)

derstand, those cars are sent out during the busiest part of the season; is that right?

A. That's right.

Q. And they are sent out for the purpose of taking care of the business of you and Reilly Atkinson and any other salesmen who handle Cummer-Graham products? A. That's right.

Q. Now, how are they billed from Paris, Texas? Who are they billed to?

A. Well, that's hard to answer who they are all billed to, because naturally I don't know who they are all billed to.

Q. Well, the ones you have——?

A. (interposing) Well, there might be some that was billed to Reilly and he might not have needed them and I needed them quick, and so we diverted them to me and they charged me and credited Reilly. On the other hand, the next week I might have some cars and I found out I didn't need them, and Reilly was dying to have them, and so we would divert them to Reilly, and he would be charged and I would be credited.

Q. When they ship those roller cars, do they bill them to one of the men in this——?

A. (interposing) Well, those aren't sight draft cars.

Q. Well, I don't mean sight draft cars; roller cars. A. Yes.

Q. Do they bill them to one of the men in this state or this adjacent territory who handles their products?

(Deposition of Frederick C. Hogue.)

A. Well, as far as I know, the ones that have been [102] billed to me have, of course.

Q. (By Mr. Donart) Well, putting it this way: You don't know of any where they roll them out billed to Cummer-Graham at Nampa, Idaho, or some such place as that?

A. Well, that's a little hard to answer. I believe, though, that they would have to have someone's name connected with that billing, in order to look after them; otherwise, they would set and none of us would know about them, to take care of them.

Q. And on these sight draft cars, as I understand your testimony, on all of those you had anything to do with you were the one who drew the sight draft on the man you sold it to?

A. Yes, that's right.

Q. Just summarizing, as I understand your deal with Cummer-Graham, you handle their products out here? A. Yes.

Q. And you order the stuff from them, and they charged them to you? A. That's right.

Q. You sell them out and you charge to your customer. And Cummer-Graham holds you responsible for their purchase price, whether you collect from the customer or not? A. That's right.

Mr. Donart: That's all.

Mr. Eberle: All right. Supposing we come back at one, then?

Mr. Donart: All right.

Mr. Eberle: And if you can find that contract——.

(Deposition of Frederick C. Hogue.)

The Witness: Yes, I will come back here early. [103]

(Whereupon, at 12:05 P.M. of said day, the noon recess was taken.)

Afternoon Session
1:00 o'clock
Tuesday, March 17, 1942

FREDERICK C. HOGUE,

recalled as witness on behalf of the plaintiff, and having been previously duly sworn, testified as follows, upon further

Direct Examination

By Mr. Eberle:

Q. Mr. Hogue, have you found your contract with Cummer-Graham Company? A. No.

Q. Before we close the deposition, will you make another search for it? A. Yes.

Q. Now, Mr. Hogue, with reference to the roller cars that were mentioned, these roller cars as I understood your testimony were not shipped in on any prior sale? A. (No answer).

Q. Prior sale of the merchandise or the supplies contained in the cars.

A. Well, they might be applied on one.

Q. Well, I thought you said in your testimony this morning that some of these growers didn't

(Deposition of Frederick C. Hogue.)

want to make their purchases until later in the season, and that the Cummer-Graham Company would have these roller cars coming in here so that these growers could purchase them; is that true?

A. Yes.

Q. So in those cases there would be no prior sales?

A. No, until you sold it and got it. [104]

Q. (By Mr. Eberle) Now, you say these were charged to you. Does that have reference to these invoices? A. Yes.

Q. In other words, you mean they were invoiced to you, and you consider that your charge?

A. Yes.

Q. Now, are these roller cars invoiced to you before you advise Mr. Kinney that you want the cars?

A. No, if they had some cars on track and I wanted one, they wouldn't invoice it until I had taken it.

Q. That's it. In other words, if Cummer-Graham Company had these roller cars on the tracks in Idaho, you wouldn't be invoiced or charged until you advised Mr. Kinney or some other representative of the company that you wanted the car; is that true?

A. Well, yes. On the other hand, if I had, say, six cars coming in and they were billed to me, and Reilly wanted a car, I would probably give him a car,—or vice versa.

Q. But those would be cars that you had ordered?

(Deposition of Frederick C. Hogue.)

A. Well, in other words, what I might do is tell them to ship me five or ten cars, see? And they would ship those in to me, and if when they got here, if I found out I couldn't get rid of the ten, I would probably find out if Reilly couldn't take some of them, to get them off of the track.

Q. Well, but there are some roller cars come in—and that was the practice of Cummer-Graham Company—in Idaho that would be available in the event you needed them?

A. Well, lots of times there might be cars going into Washington that, if we were in a hurry, we could get them.

Q. But they would also have cars in Idaho, so that if [105] you wanted them they would be available for you?

A. Well, the past year I don't—I believe that every roller car was—it was in a way a roller car, but I believe it was billed to either Reilly or myself, although we might not have a particular order for it.

Q. (By Mr. Eberle) All right, do you have any invoice for a roller car that was billed to you before you ordered a car?

A. That was billed to me before I ordered it?

Q. Yes. A. No.

Q. In other words, there would be no invoice no billing to you on these roller cars unless you diverted it or ordered the car?

A. That's right.

(Deposition of Frederick C. Hogue.)

Q. So as to these roller cars, they were Cummer-Graham Company property until you directed Mr. Kinney or someone to divert it to you, or you wanted it, in which event it would be invoiced to you; is that right? A. That's right.

Q. Now, you said Mr. Palumbo was a dealer. Did you sell Mr. Palumbo his cars of supplies from Cummer-Graham Company in 1940, or did he buy those direct?

A. I don't think Palumbo bought anything from Cummer-Graham in 1940. He is a dealer as far as any manufacturer is concerned.

Q. All right, will you check your invoices and see if you have any invoices covering any shipments from Cummer-Graham to Palumbo in 1940?

A. I can, yes. [106]

Q. (By Mr. Eberle) Will it take you very long to do that? A. 1940?

Q. September, I think, is when he got some of these cars.

(Witness makes a considerable search of his files.)

A. I will have to check that, but I don't believe I sold Palumbo anything in 1940.

Q. Well, now, do your books show any commissions received on account of a sale to Mr. Palumbo in 1940?

A. They wouldn't if I hadn't sold him anything. How would it be if I looked that up afterwards?

Q. All right. Will you look that up, if you

(Deposition of Frederick C. Hogue.)

want to, and we will check that. Or, have you got your journals and ledgers, you could bring down here, and we could check it together? It wouldn't take more than a minute, would it?

A. Yes, we can check that.

(Witness leaves office and returns with bookkeeper, and a search is made of the files and records.)

A. No, there isn't any for 1940. I didn't think there was.

Q. How do you carry your Cummer-Graham account? Is that a ledger account?—as long as you have got the books here.

A. Yes, ledger account.

Q. There isn't any account for Palumbo?

A. No.

Q. Now, Mr. Hogue, under your contract, if you or Mr. [107] Kinney sold Mr. Palumbo any cars, whether they were roller cars diverted from Nampa or cars shipped on order, would Cummer-Graham owe you a commission on these sales?

A. The only way they would owe me a commission on any sales would be if I went over here and sold Palumbo myself.

Q. (By Mr. Eberle) And if Kinney sold Palumbo, then Cummer-Graham would owe you no commission? A. That's correct.

Q. Now, Mr. Hogue, in your answer as garnishee in this case you stated that you had on hand certain baskets, tubs, or hampers of Cummer-Gra-

(Deposition of Frederick C. Hogue.)

ham Company. Now, how did you get possession of those?

A. Well, they were shipped to me.

Q. Well, now, would that be the carry-over from one season to another?

A. Well, yes, that could be.

Q. Well, now, just explain how you would carry over baskets from one season to another for Cummer-Graham Company.

A. Well, you see they ship the merchandise to me on consignment, and so my picture in the thing is that I either have to have the money or the inventory, one or the two.

Q. Oh, I see. In other words, your contract is one whereby they ship the baskets to you on your order and you sell them on a commission, and you either have to return the baskets or the money; is that true?

A. Either have the baskets or the money; that's correct.

Q. And then at the end of the season, any baskets which you have ordered which haven't been sold, you store for and on behalf of the Cummer-Graham Company?

A. No, I store them, you might say, for myself. In [108] other words, as I see it, I would say that the inventory was collateral to Cummer-Graham Company, but I insure it and pay the storage on it.

Q. (By Mr. Eberle) Well——?

A. I don't know just what you mean there.

(Deposition of Frederick C. Hogue.)

Q. You say that your contract provides in the first instance that this stock or these baskets are consigned to you, and you either have to turn the money over to them or the baskets or merchandise?

A. Yes.

Q. Well, that situation doesn't change during the year; at the end of the year the baskets are still Cummer-Graham's; is that true?

A. (No answer).

Q. The unsold baskets are still Cummer-Graham's baskets; is that correct?

A. Well, I don't know whether they would be Cummer's or not. We are charged with them, and we pay the storage on them; but if I were to die or anything, they could come in and get them.

Q. In other words, the baskets belong to them, if you don't sell them? A. Yes.

Q. Now, those baskets are invoiced to you at a certain price when you order them? A. Yes.

Q. Is that price fixed at the beginning of the year?

A. Well, they usually—yes, they usually come out with their price list at the first of the year.

Q. Now, when you carry over into a second year a stock [109] of the baskets such as you mention in your answer as garnishee, and they send you a price list at which to sell those baskets the next year, is that price identical with the year before?

A. Well, in this particular case, it so happened that of the stock I had on hand I haven't yet had

(Deposition of Frederick C. Hogue.)

reason to sell them; but I would imagine that when I do sell them, I will sell them at the new price.

Q. (By Mr. Eberle) Now, you have been invoiced once for those baskets?

A. Yes.

Q. And then you store them for the winter for Cummer-Graham, and then when spring comes Cummer-Graham will put a new price on those baskets?

A. Well, I am believing they will. They haven't, yet.

Q. And the price will fluctuate from year to year? A. Yes.

Q. And then how are those invoices adjusted from the prior year, to the new price?

A. I couldn't tell you that; we haven't had it, yet.

Q. Well, in prior years how was the price adjusted?

A. I have never had any carry-over of the bushels and half-bushels; and the pea tubs and pea hampers, which are these (indicating), have been carried over for two years. In other words, I have never sold any of that piece of inventory there, so I don't know just——. I would suppose they would just send me a price list, and if and when I could sell some of these, I would sell them at the new price list, from which they would benefit.

Q. Then how would you adjust your books so far as the invoice price was concerned when these baskets were originally [110] invoiced to you?

(Deposition of Frederick C. Hogue.)

A. I just don't know.

Q. (By Mr. Eberle) Now, take these tubs and hampers, Mr. Hogue, mentioned in this answer of garnishee, which you say you have held in storage here for two years: Have you paid the storage and insurance on those for the two years? A. Yes.

Q. Now, how are you going to get that money back that you have expended for storage and insurance on these Cummer-Graham hampers and tubs?

A. Well, I guess you don't get it back; it's what you have to pay out of the commissions that you have received.

Q. Well, but you haven't received any commissions on these tubs, have you?

A. Not yet, no, but you see, what I have—I have, it would be a blanket policy, and I carry the insurance, and we will say maybe that policy costs a hundred dollars a year, deposit; and I will cover all the bushels and half-bushels that come in and are sold and are gone, but this blanket policy covers these; and I don't get anything back, but I pay that out of what I may have earned—it's just a cost, you might say.

Q. So that the price changes on these supplies are not material, in view of the fact that you just get a commission on the sale; is that true?

A. How do you mean, "not material"?

Q. Well, the price changes during the time that you have them in your possession for Cummer-Graham; is that true?

(Deposition of Frederick C. Hogue.)

A. It could change, yes.

Q. Yes, and if the price changes, that doesn't affect [111] you excepting that you cannot sell them excepting at the new price; is that true?

A. Yes.

Q. (By Mr. Eberle) And when you do sell them, the invoice to you means nothing—the old invoice means nothing, because you merely sell on a commission; is that true?

A. Yes, I think that would be right.

Q. So that, as I understand your testimony, then, these baskets that you get and these supplies you order from Cummer-Graham and are invoiced to you, are really not your baskets?

A. Well, I don't know. What do you mean by that? It's kind of a technical thing, I would say. They are mine, and yet they could come in and take them, sure as the world, if I was in default or something.

Q. Do I understand your testimony to be that they could change the price on your baskets?

A. Well, if they brought out a new price list; most anything anyone handles, you sell at the new price list.

Q. Well, let me put it this way, Mr. Hogue: If you actually bought these baskets at the price according to that invoice, do I understand that they could later increase that price?

A. Well, I really don't know. They would send me a price list to resell at, but whether they would

(Deposition of Frederick C. Hogue.)

raise my cost—that's what you mean, I guess—I don't know, because it hasn't come up.

Q. Well, I thought you said, Mr. Hogue, that as to some of these supplies it did occur in prior years—not as to hampers and tubs, but as to some other supplies—the [112] price was changed in the spring.

A. Well, just for example, if I was invoiced with bushel baskets at, say, a dollar and a half a dozen, and you were selling at that price and buying at that price; and along in the fall they might raise to a dollar and sixty-five, and I would be selling at that price and buying at that price.

Q. (By Mr. Eberle) But it would be the same baskets they had been invoicing to you at a dollar fifty?

A. I see what you mean, but I can't remember of any place where I have had a carry-over of baskets that had been invoiced to me.

Q. Well, I don't mean just baskets, but any supplies.

A. No, no baskets or hampers or tubs.

Q. Or anything else? A. No.

Q. Has the price changed on any of this merchandise in the last three years? A. Yes.

. Has it changed between the time it was invoiced to you and the time that you sold it?

A. I can't think of any time that it has been, outside of this carry-over I have got now, which is invoiced to me at a certain price; and like I say,

(Deposition of Frederick C. Hogue.)

I haven't sold any of it, but I haven't had any re-invoice or anything that would raise the price.

Q. But under your contract they can raise the price on that?

A. I don't know whether they can or not.

Q. Probably we had better defer that until we get the contract. Now, do you receive a commission on all baskets of [113] a certain type sold in this territory, or only on your sales?

A. Only on my sales.

Q. (By Mr. Eberle) In other words, you get no commission on the baskets that Mr. Kinney sells to growers or dealers? A. No.

Q. Now, during the last three years were there any roller cars that were not diverted or sold, that were placed in storage?

A. The last three years? No, there was none that I know of.

Q. Is there anything in your contract that, if roller cars are not sold or diverted, that you are to store them?

A. Well, we had better hold that up, too.

Q. All right. Now, where you had baskets in stock, unsold, at the end of the season, what do you do with reference to inquiring of Cummer-Graham Company what to do with those baskets?

A. Well, we have warehouses that we store the baskets in, and at the end of the season we just check our inventory; and we don't ask them what to do with them; there is nothing to do with them but store them, until the next season.

(Deposition of Frederick C. Hogue.)

Q. When you don't sell them, do you advise them as to the inventory, or do they inquire of you as to the inventory?

A. We tell them what we have that's unsold.

Q. And what do they do, then, with respect to that inventory you send them?

A. Well, that just goes back to the total amount of the shipments they have sent up here, should equal what we have on hand plus the cash we have sent them. [114]

Q. (By Mr. Eberle) Now, I noticed in this one file here you have, "Wired Kinney." Is that in reference to a diversion of a car?

A. Here is the diversion of the car; it was shipped to myself at Fruitland, and I diverted it to Emmett. Now, this was evidently the wire I wired when I ordered the car.

Q. You wired Kinney when you ordered the car?

A. I believe that's what I did here, either Kinney or whoever had them.

Q. Then, if Kinney was in the state of Idaho, you would advise him about diverting any of these roller cars?

A. Well, usually if he was here, if I needed a car, I would get hold of Herbert and he would contact Reilly or someone and try to find me one.

Q. Herbert is C. H. Kinney? A. Yes.

Q. You would either get in touch with Mr. Kinney or——?

A. If it was a car that wasn't billed to me, I wouldn't divert it without authority.

(Deposition of Frederick C. Hogue.)

Q. Without authority from Mr. Kinney?

A. Yes, Mr. Kinney, or Reilly, whoever it was going to.

Q. Well, you are going to check up and see if you have any invoices on those roller cars?

A. Yes.

Mr. Eberle: If you want to examine a little more, we will go on some more in a little while.

Cross-Examination
(Additional)

By Mr. Donart:

Q. As I understood your testimony, the only way a roller car differs from any other car is that it is a car sent [115] out here, either invoiced to you or to Reilly or somebody else in this territory, and instead of the one it's invoiced to being the one who finally receives it, why with the consent of the man it is invoiced to it is switched over to either you or to some other dealer? A. Yes.

Q. (By Mr. Donart) In other words, all of these roller cars are invoiced by Cummer-Graham to one of their brokers or factors or whatever you are called, here in this state?

A. As far as I know, that would have to be the way.

Q. That's what I am getting at: You don't know of any instance or any practice they have of just starting roller cars out invoiced to Cummer-Graham, and then transferred to you people as and when you

(Deposition of Frederick C. Hogue.)

called for them; you don't know of any practice of that kind?

A. Well, I don't because I think it would have to have somebody on there to notify.

Q. That's what I was getting at. Now, as regards your answer to the garnishment, and this carry-over: As I understand, you have a carry-over now of some of the materials that were invoiced to you by Cummer-Graham; is that right?

A. That's right.

Q. And the only communication you have from Cummer-Graham which would support a bookkeeping entry is that invoice that's been sent to you?

A. Uh, huh.

Q. They were invoiced to you at a certain price?

A. (No answer).

Q. That's right? A. That's right. [116]

Q. (By Mr. Donart) And when you get ready to sell them out, you will be given a new sale price, if the sale price changes? A. Yes.

Q. But you don't know whether the price at which they are invoiced to you, as between you and Cummer-Graham, will be changed? A. No.

Q. You don't know whether you pay for them at the present price, present invoice price or whether Cummer-Graham may change that? A. Yes.

Q. As I understand, you have never had any instance where they ever have changed it?

A. No.

Q. You have always settled on the original invoice price; if the price goes up, you make a profit?

(Deposition of Frederick C. Hogue.)

A. (No answer).

Q. If the price goes up, and you are directed to sell them at a higher retail price?

A. Well, as a rule this changes so fast I hardly know of it changing in the middle of a deal.

Q. I mean, if they advanced the price of the stuff you are carrying now, as far as you know you will make that much more profit? A. Yes.

Q. And that will take up some of the expense of yours for storage and insurance? A. Yes.

Q. So, as I understand the arrangement, they ship this [117] stuff out here to you, and charge you the invoice price at the time they ship it?

A. That's right.

Q. (By Mr. Donart) And the date of payment is fixed by the time when you sell the stuff—when you resell? A. That's right.

Q. In other words, they are not to bill you for the invoice price until after you have sold it?

A. Yes.

Q. And whenever you have sold it, whether it's on cash or credit, then you owe the invoice price?

A. That's right.

Mr. Donart: That's all.

Redirect Examination

By Mr. Eberle:

Q. Well, Mr. Hogue, I thought you said you had paid the insurance and storage out of your commissions?

(Deposition of Frederick C. Hogue.)

A. Well, that's one place where I get the money to pay it from, yes.

Q. Well, do you ever make more than your commissions on these sales?

A. Well, I do if these hampers and tubs are billed to me at one price, which they are now, but at the time I sold them I sold them at a higher price, I would make a commission and I would also make an extra profit.

Q. Yes, but if they raise the price to you, you wouldn't. Your commission is based on the sale price, isn't it?

A. Well, here is a part of an answer to that: Now, these—let's see—I think these hampers were invoiced to [118] me at fifteen cents two years ago, and if I sold those for fifteen cents I would make a commission; but if I sold them at sixteen, I would make a commission and an extra profit.

Q. (By Mr. Eberle) But I thought you said they would fix the price to you next spring?

A. Well, they will probably give me a price to sell them for, but whether they will raise it up or not, I don't know.

Q. But suppose they raise it up?

A. Well, then I would have a commission instead of a commission and a profit.

Q. So you would just have a commission, if they raise the price to you? A. Yes.

Q. And so that you would still have to get your storage and insurance out of your commission?

A. Yes.

(Deposition of Frederick C. Hogue.)

Recross Examination

By Mr. Donart:

Q. Well, now, this commission: You can call it either a commission or profit, can't you?

A. It can be either way, because——

Q. In other words, what it amounts to is this: They charge them to you at one price, and you sell them at a different price, and the difference between the price you buy them for and the price you sell them for is what you make?

A. Yes, that's right.

Q. You can call it either commission or profit, can you not? A. Yes. [119]

Mr. Donart: That's all.

Redirect Examination

By Mr. Eberle:

Q. Have they raised the price on baskets during any of these years, during the season?

A. I don't know of any time they have, during actual season.

Q. Have they raised the price from one season to the next? A. Yes.

Q. Well, now, then, where there was a carry-over, and they raised the price, would you then settle on the basis of the new price?

A. Well, I never had that instance come up; I never had the carry-over.

Q. Now, what does your contract say about your commission being based on the gross sale price?

(Deposition of Frederick C. Hogue.)

A. The gross sale price——. Well, your commission is based on the selling price less the freight.

Q. Selling price, less the freight. Who pays the freight? A. The consumer.

Q. All right, now, what does that commission amount to? A. Seven per cent.

Q. In other words, your contract is that you get seven per cent of the selling price less freight. That's when you sold to a grower?

A. To a dealer.

Q. All right, now, that's to a dealer. Now, if you sold to a grower, what would be your commission? [120]

Mr. Donart: Just a minute. Don't you think that's being a little inquisitive about a man's business?

(Discussion of counsel, off the record).

Mr. Eberle: I will withdraw that.

Q. (By Mr. Eberle) If you sold to a grower, it would be more than seven per cent?

A. Well, I don't believe I sell any growers, is what I was thinking of.

Q. But under your contract you would have a higher per cent for growers than for dealers?

A. You wouldn't, according to last year. I believe the carload price was the same to anyone who could buy it.

Q. All right, under your contract with Cummer-Graham, the only compensation you receive for all your service is this seven per cent on the selling price less freight; isn't that true? A. Yes.

(Deposition of Frederick C. Hogue.)

Q. Regardless of what the selling price or invoice may be? A. Yes, I think that's right.

Mr. Eberle: That's all.

Recross Examination

By Mr. Donart:

Q. Well, do you know whether that will be the arrangement if this stuff is marked up, or do you know whether you will still settle with them on the basis of the invoice price on which it is charged to you on the books at this time?

A. I don't know.

Mr. Donart: That's all. [121]

Redirect Examination

By Mr. Eberle:

Q. Well, unless you make a new contract, if this contract covers next year, you will still get only a commission, won't you?

A. Well, you would get more than a commission if the price was not raised.

Q. Well, now, in other words, if they would increase your commission; but I mean under your present contract, it only provides for a seven per cent commission on the sale price less freight; isn't that right? A. I think that's right.

Mr. Eberle: That's all.

Recross Examination

By Mr. Donart:

Q. Now, putting that another way, isn't all that

(Deposition of Frederick C. Hogue.)

amounts to this: They invoice them to you at a price which is seven per cent less than the price at which you sell them? A. That's right.

Q. What it amounts to is they invoice them to you at a price seven per cent below that for which you sell them? A. Yes.

Mr. Donart: That's all.

Redirect Examination

By Mr. Eberle:

Q. And that would be true regardless of what the sale price was? A. Yes, I think it would.

Q. Yes. So if they were increased or lowered, the sale price, your seven per cent would still be on the sale [122] price less freight? A. Yes.

Mr. Eberle: That's all.

Recross Examination

By Mr. Donart:

Q. Well, now, do you know whether—say they raised the price on the ones you have now, do you know what your settlement will be with Cummer-Graham, whether you will still settle with them at the price at which they are charged to you now, or whether you would settle with them at an increased price?

A. On the inventory I have now?

Q. Yes.

A. No, I don't know, because it's never happened.

(Deposition of Frederick C. Hogue.)

Redirect Examination

By Mr. Eberle:

Q. When will you know?

A. When the season comes, I will ask them.

Q. And when the season comes you will ask them what you are supposed to pay for these baskets and what you are supposed to sell them for?

A. I would ask them what I am supposed to sell them for.

Q. And what would they do, invoice them to you at seven per cent less than the price you are supposed to sell them for?

Mr. Donart: Just a minute. I object to that. The witness has stated he doesn't know.

Mr. Eberle: All right, if you will check those invoices on the roller cars, and that contract, [123] we might ask Mr. Hogue, Senior, some questions.

Is that agreeable to you, George?

Mr. Donart: Yes, that's all right.

(Witness excused). [124]

F. H. HOGUE

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Your name? A. F. H. Hogue.

Q. Mr. Hogue, you live in Payette?

(Deposition of F. H. Hogue.)

A. I do.

Q. And what is your business?

A. Fruit and produce.

Q. And you own and operate orchards?

A. Yes, sir.

Q. How long have you owned and operated orchards?

A. Oh, I would say about twenty-five years.

Q. And you are also engaged in packing fruit for those orchards? A. Yes, sir.

Q. Now, how long have you been engaged in the packing of fruit from those orchards?

A. Thirty years. —From these orchards, you mean?

Q. Yes. A. The same time.

Q. And from whom did you buy those supplies in the last four or five years?

A. Well, we bought from the Basket Sales, up to two years ago, and then we bought through Frederick's, from there on out.

Q. And "Frederick's" is F. C. Hogue?

A. That's right. [125]

Q. (By Mr. Eberle) Now, during those years did you buy for your own orchards as well as for other orchards, or just for your own orchards?

A. We bought wherever we could sell.

Q. So you were engaged as a dealer for others, as well as for supplies for your own orchards?

A. Yes, that's our business. We don't buy from just one party, you know; we buy from different people.

(Deposition of F. H. Hogue.)

Q. Now, were you a retail dealer for Cummer-Graham in 1939?

A. No, sir, we wasn't.

Q. During what years were you a retail dealer for Cummer-Graham?

A. We never was a retail dealer for Cummer-Graham; when we did business for Cummer-Graham, we bought them outright. And I think that was '38, was the last year we did any business. I would have to check up for sure.

Q. Now, in connection with the supplies, baskets, tubs, and so forth, that you purchased for use as a grower in your own orchards, did you buy those at a discount?

A. Well, at that time all basket sales carried a discount. We didn't endeavor to keep them separate, what we used or what we sold; but in those days it was rulable to get a discount.

Q. In other words, you got a discount on what you bought, whether you told them it was for your own use or to sell to someone else?

A. Well, we buy outright; we don't have to tell them anything; we buy outright and do whatever we want with them, and the discount is the same. [126]

Q. (By Mr. Eberle) And your dealer discount would apply, whether you sold them to someone else or whether you used them at your own orchards? A. That's right.

Q. And you did? A. Yes.

(Deposition of F. H. Hogue.)

(Whereupon, a "Certificate of Retail Dealer" signed by the witness and dated July 12, 1939, was marked, "Plaintiff's Exhibit 2 for Identification.")

Q. Mr. Hogue, handing you Exhibit 2 for Identification, I will ask you if the "F. H. Hogue" appearing thereon is your signature.

A. Yes, that's my signature.

Mr. Eberle: I now offer that in evidence.

The Witness: Well, it looks like this was '39. I think I told you '38. If it's '39, that's what it is.

Q. Now, Mr. Hogue, did you owe Cummer-Graham anything during—at any time during 1939, 1940, or 1941? A. Yes, I did.

Q. Now, when did you owe them?

A. Well, I can't tell you that. We owed them all through those years. I can't tell you that. That's a matter of book record. —Let me see. (Witness examines records). No, we didn't owe Cummer-Graham; we owed the Basket Sales, not Cummer-Graham.

Q. Basket Sales was a sales agency handling Cummer-Graham baskets?

A. Well, everybody's baskets. —Not everybody's baskets, but they handled eight or ten mills. We didn't know [127] whose baskets we would get. We didn't have any choice; they gave us whatever they wanted to. We took them.

Q. (By Mr. Eberle) Did you ever use or sell any baskets during those years, owned by J. A. McGill of Paris, Texas?

(Deposition of F. H. Hogue.)

A. I don't recall any coming that way.

Q. Well, now, how did you carry the account, with reference to baskets, that you received during those years, manufactured by Cummer-Graham Company?

A. Well, we carried it all under the Basket Sales. We didn't try to identify the different mills at all.

Q. You simply carried the name of the sales agency? A. That's all.

Q. Now, did you make a trust agreement or assignment for the benefit of your creditors, in those years? A. Yes.

Q. When was that?

A. I think that was the 14th of February, a year ago; that would be one year the fourteenth of February.

Q. Now, have you a list of those creditors, or has Mr. Brubaker got that?

A. Well, Mr. Brubaker is the trustee; he would have that.

Q. Was it an assignment or a trust agreement?

A. Trust.

Q. And he would have a copy of that, I suppose, too. Now, who made the arrangements with you for that trust agreement?

A. Oh, Mr. Donart here, I think, handled the papers on it.

Q. I mean in negotiations with the creditors, did you [128] talk to anyone about it?

(Deposition of F. H. Hogue.)

A. No, we didn't have a creditors' meeting.

Q. (By Mr. Eberle) Who did you talk to about it?

A. I talked to my attorney about it.

Q. That's the only one?

A. No, but he was one of them. And I talked to the bank. You have to talk to the bank, you know.

Q. Did you talk to Mr. McGill?

A. We talked to his representative.

Q. What's his name?

A. DeShong; he was here.

Q. And who else did you talk to about it? Any other representatives? Mr. Kinney?

A. Well, I talked to Mr. Kinney. I talked to his father, who was the trustee.

Q. That's A. N. Kinney?

A. No, I think it's C. H. and C. N.

Q. Now, for instance, what did you discuss with C. H. Kinney about it?

A. Well, I don't remember just what was discussed, except this, that we couldn't pay them; that was the main discussion, and that I thought the best thing to do was to let somebody else handle it; and that's what we did do.

Q. Have you a list of those creditors?

A. Oh, no, I turned it all over to the trustees; I haven't any list of them. I know some of them, but I haven't any accurate list I could give you.

Q. What would be the amount of the item C. H. Kinney discussed with you?

(Deposition of F. H. Hogue.)

A. Basket Sales. [129]

Q. (By Mr. Eberle) What would be the amount of that item?

A. That would be up at thirty thousand, maybe a little more. That would be the Basket Sales Company. He represented that.

Q. Now, prior to that time, along in February, 1939, did you make a mortgage to Mr. McGill?

A. I think that was the month.

Q. Now, was that the same property that was included in the trust agreement, that was included in the mortgage? A. Yes.

Q. The mortgage was made in 1938 wasn't it?

A. Yes, that's right.

Q. Well, the mortgage which we found recorded in Book 13 of Mortgages at page 575, Records of Payette County, is dated February 10, 1939, Mr. Hogue.

A. That's all right; that's when it was; that must have been two years before this happened.

Q. Now, that was two years before the trust agreement? A. That's right.

Q. Is the property described in that mortgage the same as that described in the trust agreement?

A. It should be; it was the same property.

Q. Was that mortgage satisfied or what is the status of that mortgage?

A. It's on record yet, not satisfied.

Q. And the trust agreement was subject to that mortgage? A. It must have been.

(Deposition of F. H. Hogue.)

Q. Now, this note in the mortgage referred to as [130] $33,694.00: Was that for baskets purchased? A. All baskets, yes.

Q. (By Mr. Eberle) And purchased through the sales agency of Basket Sales Company?

A. That's right.

Q. Now, when C. H. Kinney took his father back to Denver in October of '41, he came back after that, didn't he, Mr. Hogue?

A. Yes, he did.

Q. And then what did he do with reference to the orchards there, when he came back?

A. Well, I think he went away twice. I have got to kind of think about that a little bit. But I know that the orchards were leased by the trustee; I know that; I don't remember just what trips he made.

Q. And he kind of looked after them there?

A. He did.

Q. And did you buy the fruit from those same orchards in 1941? A. No, sir.

Q. Who was the fruit sold to, in 1941?

A. We sold them, but we didn't buy them. We sold to anybody we could, you know, regular trade; but we didn't purchase them.

Q. And who did you consult with reference to those sales?

A. We didn't consult anybody; we were turned loose on it, to do the best we could, and we didn't ask anybody, and we weren't disturbed.

(Deposition of F. H. Hogue.)

Mr. Donart: Is that all? [131]

Mr. Eberle: Yes.

Mr. Donart: No cross-examination.

(Witness excused). [132]

SCOTT BRUBAKER,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. State your name, Mr. Brubaker.

A. Scott Brubaker.

Q. And you live in Payette?

A. Yes, sir.

Q. Mr. Brubaker, are you acting as trustee for creditors in connection with some orchard property in Payette County?

A. Well, yes, but it includes other properties.

Q. I see. Other properties in addition to orchards? A. Yes, sir.

Q. Have you the petition and order pursuant to which you were appointed? A. Yes.

Q. Can I see that?

(Witness leaves office and returns with certain documents).

A. I have a copy here. Of course it's a matter of record in the Clerk's office.

(Deposition of Scott Brubaker.)

Q. Yes, I know.

(Discussion of counsel and witness, off the record).

(Whereupon, a copy of Order Appointing Trustee, dated January 14, 1942, was marked, "Plaintiff's Exhibit 3 for Identification.")

Q. Handing you Exhibit number 3, Mr. Brubaker, I will [133] ask you if that's the copy of the order appointing you trustee.

A. Yes, sir.

Mr. Eberle: I will now offer that in evidence.

Q. (By Mr. Eberle) Now, who was the petition signed by, pursuant to which this order was issued?

A. Well, if I recall correctly, it was the First Security Bank, F. H. Hogue, and J. A. McGill.

Q. And who signed for J. A. McGill?

A. I can't be sure of that. I can't recall.

Q. C. H. Kinney, agent?

A. Well,——

Q. Or do you know what the petition shows?

A. Well, I have seen the petition, but I can't recall just who did sign for J. A. McGill.

Mr. Eberle: There would be no objection to our getting a certified copy of that petition——?

Mr. Donart: (Interposing) Why, there is no objection to your getting a certified copy of anything that's of record in the court house.

Q. (By Mr. Eberle) But you have no copy of the petition? A. No.

(Deposition of Scott Brubaker.)

Q. Have you a copy of the trust agreement?

A. Yes, sir.

Q. May I see that?

A. (Producing document) That seems to be an original, George.

(Discussion of counsel, off the record).

Q. (By Mr. Eberle) Now, Mr. Brubaker, handing you Plaintiff's Exhibit number 4 for Identification, I will ask [134] you if that's the trust agreement referred to in the order, Exhibit 3?

A. It is.

(Discussion of counsel, off the record).

(Whereupon, it was agreed that a copy of said trust agreement was to be furnished by Mr. Donart, and same was deemed marked, "Plaintiff's Exhibit 4 for identification.")

Mr. Eberle: Now, it is understood that Mr. Donart will endeavor to mail you a copy of that, Mr. Kester.

Q. (By Mr. Eberle) And in the list of creditors there appears one J. A. McGill, Paris, Texas, for $33,694.00? A. Yes, sir.

Q. Have you the records of the trust?

A. Yes, sir.

Q. Have any payments been made to any of the creditors?

A. (Witness shakes head in negation). Well, let's see. Nothing more than interest.

Q. Has interest been paid to anyone on account of the claim denominated J. A. McGill?

(Deposition of Scott Brubaker.)

A. No.

Q. Has any payment been made on account of that claim? A. No.

Q. Has any interest been paid, or any payment been made on account of the note or mortgage to J. A. McGill? A. No.

Q. Do you know who sold the fruit from the lands described in the trust agreement, in 1941?

A. All of the land, or just those mortgaged to—or just on which McGill has the mortgage? Do you have reference [135] to all——

Q. (By Mr. Eberle) Well, either one.

A. Without referring to records, I would say that F. H. Hogue, Inc. sold them.

Q. Do you know who handled the fruit on the lands mortgaged to J. A. McGill?

A. The lands that are mortgaged to J. A. McGill was leased to J. A. McGill by the trustee; C. N. Kinney, Trustee.

Q. And what were the terms of that lease?

A. Do you want them in detail?

Q. Well, have you got the lease? Have you got a copy of the lease?

A. No, I haven't, no.

Q. As trustee you do not have a copy of that lease, then? A. No.

Q. Well, who looked after the interests of J. A. McGill, then, in connection with that lease?

A. C. N. Kinney, agent—or—yes, C. N. Kinney, agent for J. A. McGill.

(Deposition of Scott Brubaker.)

Q. C. N., or C. H.? A. C. N.

Q. In other words, the trustee leased to McGill, and then was his agent in looking after it?

A. Yes.

Q. Where did you get the information about the lease?

A. I got it from C. N. Kinney, from the record that was turned over to me.

Q. And you say you haven't that record now?

A. I haven't the lease; I haven't a copy of the lease. [136] I have looked for it, but none was turned over to me.

Q. (By Mr. Eberle) What record would show what you have just testified to?

A. Well, I don't have that record now, but I have seen it, where he kept a record of the operations of the three orchards which he had leased,—which C. N. Kinney, trustee, had leased to McGill.

Q. And what was the rental paid?

Mr. Donart: That is objected to as immaterial.

A. (No answer).

Q. (By Mr. Eberle) Can you answer the question?

A. My recollection is that it was twenty-five per cent of the profits from the operation of the three orchards.

Q. And did the trust receive any payment?

A. Yes.

Q. Did the trust make any payment in connection with the property? A. To whom?

(Deposition of Scott Brubaker.)

Q. Well, to anyone.

A. Not to any of the creditors.

Q. Who—do you know personally who supervised the operation of this property leased to Mr. McGill?

A. Direct supervision, do you mean?

Q. Well, either direct or general.

A. Well, C. N. Kinney, agent for J. A. McGill, looked after the payments and so forth, but not the direct supersion or—of the orchards—itself. He employed people to do that.

Q. And was that in 1941?

A. Yes. [137]

Q. (By Mr. Eberle) Was C. H. Kinney out here at that time?

A. Well, he was here at intervals, but——

Q. During the time he was here, did he have anything to do with that property?

A. In what respect?

Q. In any respect.

A. Well, none that I can recall.

Q. Well, after he took his father, C. N. Kinney, home, or back to Denver, in October, and after he came back here, what did he have to do with that property?

A. Well, the operations of the—the 1941 operations were all closed up by that time, that is, as far as the operations under the lease were concerned.

Q. Well, I am asking you, did he have anything to do with the property at all.

A. Well, I wouldn't be able to state whether—

(Deposition of Scott Brubaker.)

whether he had anything to do with it or not.

Q. Did he act as agent for Mr. McGill in any capacity in connection with this claim or this property?

The Witness: Will you state that question again?

(Pending question read).

A. (No answer).

(Pending question again read).

A. I wouldn't be able to state positively whether he did or not.

Mr. Eberle: That's all.

Mr. Donart: That's all.

(Witness excused). [138]

Mr. Eberle: I offer Exhibit 4 at this time.

(Discussion, off the record).

FREDERICK C. HOGUE,

recalled as a witness on behalf of the plaintiff, and having been previously duly sworn, testified as follows, upon further

Redirect Examination

By Mr. Eberle:

(Whereupon, a bill of lading dated August 20, 1941, from Dayton Veneer and Lumber Mills, Americus, Georgia, to Cummer-Graham Company, Nampa, Idaho, covering a "roller

(Deposition of Frederick C. Hogue.)

car," was marked, "Plaintiff's Exhibit 5 for Identification.")

Q. Now, Mr. Hogue, handing you Exhibit number 5 for identification, I will ask you if that is the bill of lading of one of the roller cars that you have been testifying to.

(Witness examines the exhibit and other records for some time. Discussion, off the record).

A. Yes, I would say it was.

Mr. Eberle: I offer that in evidence.

Q. Now, Mr. Hogue, have you found the contract between you and Cummer-Graham, or any of the contracts between you and Cummer-Graham Company?

A. No, I haven't found it yet.

Q. How long would it take you to find it?

A. That's what I don't know.

Q. Well, you surely must have one of those contracts, mustn't you?

A. Yes, it must be around here somewhere.

Mr. Eberle: Well, can we hold this deposition [139] open, and have him send it to the reporter?

Mr. Donart: That's right. If he finds one, he can send it to the reporter.

Q. (By Mr. Eberle) Well, how long since you have seen this contract, Mr. Hogue?

A. Oh, it's been six or seven months, probably.

(Deposition of Frederick C. Hogue.)

Q. Was it in your file then?

A. I believe it was in the office here, some place.

Q. Have you a copy of it?

A. No, that's what I am looking for, is the copy.

Q. Have you any correspondence about these contracts? A. No.

Q. The negotiations were all handled by Mr. C. H. Kinney orally? Or were they in writing?

A. Well, I had a contract with Cummer, if I could find it.

Q. I mean the negotiations, or any correspondence about them.

A. Huh, uh. You see, he was here when I signed it.

Q. Who was that? A. Mr. Kinney.

Q. Is anything said in this contract about storage and insurance?

A. Yes, there is something in there about storage and insurance; I don't know just exactly the wording of it.

Q. Is there anything in there about the consignment inventory that you keep here?

A. I don't know.

Q. Let's see, in what sort of a book do you keep this consignment inventory? [140]

A. Well, we just keep a—what you might say a notation on it.

Q. (By Mr. Eberle) You mean you keep a memorandum of some kind?

A. On our inventory.

(Deposition of Frederick C. Hogue.)

Q. Well, the girl said you keep a consignment inventory, this afternoon, when we asked about it. What is that consignment inventory? How is it kept?

A. We count the number of baskets and number of hampers we have, so we will know what it is.

Q. Is that kept in a separate book?

A. I can't say; I don't know whether it is in the book or not. We keep just a record of the number of pieces.

Q. Do you know whether your contract is similar to that of Mr. Atkinson?

A. No, I wouldn't know about that.

Q. Did anyone ever tell you whether it was or not?

A. The same as Reilly has? I don't believe they did. I don't know at all about his.

Q. Well, in taking out this insurance that you say there is some provision for in this contract, what form do you take that insurance out in? Do you have a policy or a copy of a policy?

A. Well, I ran into one here. (Witness produces a document).

Q. Is this a current one or an old one?

A. 1940.

(Discussion of counsel and witness, off the record).

A. I think that Cummer-Graham has got the policy. I [141] believe that they've got it.

(Deposition of Frederick C. Hogue.)

Q. (By Mr. Eberle) So that you wouldn't have the policy here?

A. No. I think they've got the policy.

Q. Well, would your books show whether you paid the premium here?

A. Yes, we paid the premium.

Q. And then you sent the policy to them?

A. I think so.

Q. Do you think you can find that contract tomorrow, Mr. Hogue?

A. I will keep on trying this afternoon.

Mr. Eberle: Then we will come back here for a minute.

(Whereupon, the witness was excused and by agreement the taking of depositions adjourned to the office of J. C. Palumbo, in Payette, Payette County, Idaho).

(Time, 3:14 P. M.) [142]

J. C. PALUMBO,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Your name, Mr. Palumbo?

A. J. C. Palumbo.

Q. And in 1940 did you do some business with Cummer-Graham Company?

(Deposition of J. C. Palumbo.)

A. I think I did. I would have to get more details.

Q. Will you get the files?

A. All right. (Witness searches records). I think we did.

Q. Could I have the bills of lading and invoices?

A. She will get them. (Witness hands counsel certain records produced by witness' secretary).

Q. Are these for 1940? A. I think so.

Q. Now, Mr. Palumbo, do you suppose we could put these in exhibit, or would you want them returned and copies made of them—copies made for your files?

A. It doesn't make any difference to me.

Q. We could make a copy for your files or have copies made and return to you.

A. You had better make several copies and return this to me.

(Discussion of counsel and witness, off the record).

(Thereupon, a bill of lading, invoice, and other papers pertaining to a shipment from [143] defendant on September 5, 1940, was marked, "Plaintiff's Exhibit 6 for identification.")

Q. (By Mr. Eberle) Now, handing you Exhibit 6, Mr. Palumbo, I will ask you what these papers are.

A. They cover the baskets, 450 dozen.

Q. And what's that (indicating a paper)?

(Deposition of J. C. Palumbo.)

A. That's a copy where we paid them by check.

Q. Did you send the original of that to Mr. Kinney?

A. I think we paid him right here; I think Mr. Kinney came in here and got the checks. I am sure he came here and got it. That is my recollection.

Q. What is that, another invoice (indicating a paper)?

A. This is a copy of the invoice for 450 dozen.

Q. And that's the bill of lading for the same (indicating another paper)? A. Yes.

Q. (indicating still another paper in the exhibit) And a letter from Mr. Kinney,——?

A. Yes.

Q. (continuing) ——the last sheet of the exhibit?

A. Yes, for the same car, "diverted to yourselves at New Plymouth."

Mr. Eberle: I offer this Exhibit 6.

Mr. Donart: May I ask a few questions?

Cross Examination

By Mr. Donart:

Q. Calling your attention first to the letter of September 23d, which apparently accompanied your remittance: Your letter is addressed to A. V. Kinney, agent, is it not? A. Yes. [144]

Q. (By Mr. Donart) And calling your attention to the letter written to you under September 11th: It is signed by A. V. Kinney, agent?

A. Yes, sir.

(Deposition of J. C. Palumbo.)

Q. Now, Mr. Palumbo, you notice the bill of lading here, it's consigned from Mineola, Texas, September 5th, to Cummer-Graham Company, Nampa? A. Yes, sir.

Q. Do you know when you ordered that car?

A. No, sir, I couldn't tell you.

Q. Do you know whether you ordered it before September 5th or afterward?

A. No, I have no way to know. Usually they have these cars rolling, see, and then while they have them rolling we buy them while they are in transit. I think that's why this car was rolling in their name; then when we need a car, they can divert it.

Q. But you have no way of knowing where this car was when you bought it? A. No.

Q. Whether it was somewhere between Nampa and Mineola, or where it was?

A. Well, it would have to be between Nampa and Mineola; but what point it was the day I bought it, I have no way of knowing.

Q. But they diverted it to you at New Plymouth? A. Yes, sir.

Q. But whether it was within the state of Idaho or not, at the time you bought it, you don't know?

A. No. [145]

Redirect Examination

By Mr. Eberle:

Q. Mr. Palumbo, who did you talk to about buying this car?

(Deposition of J. C. Palumbo.)

A. Well, Mr. Kinney. He came here and sold me several cars, no doubt, because that speak for itself.

Q. Now, how many cars did you buy from Cummer-Graham in 1940?

A. No other cars in 1940.

Q. That's the only one, then?

A. Yes, that's all; and none this year.

Q. You didn't buy that car through anybody, that is, you didn't buy that through Atkinson or Hogue? A. No.

Q. You bought it through Mr. Kinney?

A. Yes.

Recross Examination

By Mr. Donart:

Q. You mean A. V. Kinney?

A. That's right.

Q. Now, just one more question: That car was diverted to you in its entirety? A. Yes.

Q. You got the entire car? A. Yes.

Q. And none of the packages——?

A. (interposing) No.

Q. And the seal of the car wasn't broken until it was diverted to you? A. No.

(Witness excused). [146]

(Whereupon, by agreement, the taking of depositions was returned to the office of Frederick C. Hogue, in Payette, Payette County, Idaho).

R. H. DeHAVEN,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. R. H. DeHaven.

Q. Where do you reside?

A. Benton Harbor, Michigan.

Q. What position if any do you hold with the plaintiff, The Straight Side Basket Corporation?

A. I work for them as general representative.

Q. Are you acquainted with the officers of the defendant, Cummer-Graham Company?

A. I am.

Q. Who are the officers of that company?

A. J. A. McGill, president; J. C. DeShong, vice-president; H. Wallace Norton, vice-president; and A. C. Mackin, secretary-treasurer.

Q. Are you acquainted with the officers of the Veneer Products Company? A. I am.

Q. Who are the officers of that company?

A. C. H. Kinney, president, in care of F. P. Cranston, Denver, Colorado; J. A. McGill, vice-president, care of Cummer-Graham, Paris, Texas; and A. C. Mackin, secretary and [147] treasurer, care of Cummer-Graham Company, Paris, Texas.

Q. (By Mr. Eberle) State what if any position the C. H. Kinney whom you have just mentioned as being president of the Veneer Products Company holds with the Cummer-Graham Company.

(Deposition of R. H. DeHaven.)

Mr. Donart: That is objected to upon the ground that it is incompetent. It is not the best evidence.

Mr. Eberle: Well, strike that.

Q. (By Mr. Eberle) Do you know C. H. Kinney? A. I do.

Q. Do you know in what capacity he has been employed by the Cummer-Graham Company during recent years?

Mr. Donart: That calls for an answer, "Yes," or "No."

A. Yes, sir.

Q. (By Mr. Eberle) In what capacity is that?

A. Sales manager.

Q. Now, state whether or not he is the same person that you have just mentioned as president of the Veneer Products Company. A. He is.

Q. Do you know whether J. A. McGill is an officer in both Cummer-Graham Company and Veneer Products Company? A. I do.

Q. And what offices does he hold in those companies?

A. He is president of Cummer-Graham Company, vice-president of Veneer Products Company.

Q. Do you know whether Mr. Mackin is an officer of both companies? A. He is. [148]

Q. (By Mr. Eberle) And just state what offices he holds.

A. Secretary and treasurer of both companies.

Q. Do you know in what state Cummer-Graham Company and Veneer Products Company were organized?

(Deposition of R. H. DeHaven.)

A. I am not sure just in which states they were organized. I do know that Cummer-Graham Company is a Texas corporation and that the Veneer Products Company is a Colorado corporation.

Q. Do you know where the Veneer Products Company manufactures products?

A. I do. In Texas.

Q. I will ask you——?

The Witness: Pardon me.

Q. (continuing) Just state where, in what state, they manufacture any products.

A. In Texas.

Q. Do they manufacture any products in Colorado? A. No.

Q. Do you know whether any of the officers of the Veneer Products Company are residents of the state of Colorado?

A. No, they are not, at the present time.

Q. State whether or not the Veneer Products Company reports to the Department of State or the Secretary of State of the State of Colorado.

Mr. Donart: That is objected to as not being the best evidence.

Mr. Eberle: I am not asking what the report is.

Mr. Donart: Well, whether they do or not, the [149] records would be the best evidence.

A. They do, and I have a copy of their 1941 report.

Q. (By Mr. Eberle) Do you know whether C. H. Kinney, to whom you have just referred, is an officer of any other manufacturing concern?

(Deposition of R. H. DeHaven.)

A. I do.

Q. Just state what offices he holds and in what company or companies.

A. One other factory I know of in which he is interested, he is vice-president. That is the F. E. Prince Company of Pittsburg, Texas.

Q. Are you acquainted with A. V. Kinney, whose deposition was taken in Paris, Texas, February 27, 1942? A. I am.

Q. What relation is he to C. H. Kinney, whom you have mentioned? A. Brother.

Q. Do you know what office A. V. Kinney holds in the F. E. Prince Company of Pittsburg, Texas?

A. I only know that he is general manager of that company.

Q. What office does he hold in that company?

A. I don't believe he is an officer.

Q. In what capacity does he act, then?

A. As manager, general manager.

Q. Do you know whether A. V. Kinney was ever employed by Cummer-Graham Company as a salesman? A. I do.

Q. Do you know of any sales that he made in the state of Idaho? [150] A. I do.

Q. (By Mr. Eberle) Were you in the state of Idaho during the basket selling season when Mr. A. V. Kinney and Mr. C. H. Kinney were also there? A. Yes, sir.

Q. What sales if any do you know were made in Idaho at that time?

(Deposition of R. H. DeHaven.)

Mr. Donart: May I ask a question here in aid of an objection?

What is the source of this knowledge?

The Witness: The source——

Mr. Eberle: Well, I assume it's his personal knowledge.

Mr. Donart: Well, that's what I want to find out.

Mr. Eberle: I mean while you were here.

Mr. Donart: What is the source of any knowledge you have as to any sales that you claim that you know that they made in this state?

The Witness: I have seen orders in their possession, signed orders in their possession. I have also seen checks in their possession, in payment of baskets which they have sold.

Mr. Donart: How did you know that it was in payment of baskets that they had sold or that some other agent had sold and that they had collected for?

The Witness: Only that they said that that's what the check was for.

Mr. Donart: Then your knowledge of whether [151] they made a sale is based upon what they told you?

A. In that instance involving the check, yes; but in the event where I saw the sales order, signed order for baskets, together with the statement from A. V. Kinney that he had just taken that order, I believe I can say that I know that that is true.

(Deposition of R. H. DeHaven.)

Mr. Donart: Well, we object to this evidence upon the ground that it is incompetent in that it is not the best evidence, and purely hearsay and secondary.

Q. (By Mr. Eberle) Mr. DeHaven, state whether the Cummer-Graham Company and the Veneer Products Company make baskets under a license from your company, The Straight Side Basket Corporation. A. They do.

Q. State whether any of these baskets which are made under these contracts with your company are sold in the state of Idaho. A Many of them.

Q. And state whether your company is interested——

Mr. Donart: (interposing) Now, just a minute. I want to ask a question here:

What are you using this evidence for, on the motion to dismiss?

Mr. Eberle: Yes.

Mr. Donart: And for no other purpose?

Mr. Eberle: Yes; I think that is the stipulation.

Mr. Donart: That's what I was getting at. If you are trying part of your lawsuit here, we [152] aren't stipulating that.

(Pending question, as stated, read).

Q. (By Mr. Eberle, continuing) ——in any way in baskets so sold in the state of Idaho?

A. They are.

Q. In what way?

A. We receive a percentage of the gross selling

(Deposition of R. H. DeHaven.)

price of all baskets sold in Idaho, or other states, for that matter, that are manufactured under our licenses.

Q. Are you familiar with the way or manner in which the Cummer-Graham Company sells its baskets in the state of Idaho? A. Yes.

Q. Will you state whether or not Cummer-Graham Company makes all of its sales in Idaho through so-called wholesale dealers or jobbers?

A. They do not.

Q. Do you know whether or not baskets shipped into Idaho by Cummer-Graham Company are always shipped in fulfillment of orders already booked? A. They are not.

Q. State whether or not all baskets shipped into Idaho by Cummer-Graham Company are shipped in filling of orders already booked.

Mr. Donart: Now just a minute. A question or two in aid of an objection.

What is the source of your information upon which you would answer that question if you answered it?

The Witness: I have been present and heard—and have heard A. V. Kinney and C. H. Kinney, [153] both, for that matter, telephone the railroad companies and divert cars which were consigned to the Cummer-Graham Company in some one place or another, usually Nampa, Idaho. They would give instructions to the railroad clerk to divert a car, and describe the car by number and contents; and

(Deposition of R. H. DeHaven.)

I have heard them subsequent to diverting the car telephone the customers and tell them that such car had been diverted and would be on track in such-and-such a place.

Mr. Donart: Did you see the original bill of lading on any of those cars, so that you know who they were billed to in this state, originally?

The Witness: The ones that I just described as being diverted?

Mr. Donart: Yes.

The Witness: No, I did not see those bills of lading.

Mr. Donart: That is objected to on the ground that it's incompetent, that any answer of his would be secondary evidence.

(Pending question read).

A. They are not shipped in fulfillment of orders already booked—all of them. Some of them are, of course.

Q. (By Mr. Eberle) State, Mr. DeHaven, how these cars are shipped, where there are no prior orders.

A. I have seen invoices and bills of lading on cars that were shipped by Cummer-Graham Company into Idaho with the bill of lading reading, "Consigned to Cummer-Graham Company, Nampa, Idaho." [154]

The Witness: May I have that question repeated, please?

(Last question and answer read).

(Deposition of R. H. DeHaven.)

The Witness: I believe that about covers the question.

Q. (By Mr. Eberle) Mr. DeHaven, will you state whether C. H. Kinney made any sales in Idaho of baskets or supplies for and on behalf of Cummer-Graham Company to growers in Idaho.

A. That is C. H. Kinney?

Q. Yes.

A. Only that I have talked with customers whom he has sold.

Mr. Donart: Well, that is objected to. I move to strike that answer; that is not responsive to the question.

You asked him whether he knows. It calls for "Yes" or "No."

Mr. Eberle: Yes, that's right.

Q. (By Mr. Eberle) Do you know on that?

The Witness: Do you insist upon an answer, "Yes" or "No"?

Mr. Donart: Yes.

Mr. Eberle: Well, you either know or you don't know.

A. I don't know.

Mr. Donart: I didn't think so.

Q. (By Mr. Eberle) Mr. DeHaven, do you know whether Cummer-Graham Company has in recent years sold direct to growers in Idaho? [155]

A. I do.

Q. (By Mr. Eberle) And just state what sales were so made.

(Deposition of R. H. DeHaven.)

A. J. C. Palumbo, for one. May I ask you: Do you mean by that question whether Cummer-Graham direct representatives made the sales or not?

Q. Well, including those made by direct representatives and otherwise.

A. I know that Cummer-Graham Company report to us, like all of our other licensees, every month on all sales made by their company in various states, and they report baskets delivered——

Mr. Donart: (Interposing) Now, just a minute. Are those reports in writing?

The Witness: They are.

Mr. Donart: Object to the witness testifying to the contents of the writing. The instrument itself is the best evidence.

Q. (By Mr. Eberle) Have you any of those reports here? A. I have.

Q. May we have them?

A. (After search of records) I am sorry. I don't have one of those reports here; but I can obtain them for you.

Q. Mr. DeHaven, can you supply those reports?

A. I can.

Mr. Eberle: Mr. Donart, may it be understood that these reports can be marked Exhibit number 7 for Identification and be supplied to Mr. Kester within the next few days, subject of course to your objection when offered in evidence upon the [156] hearing?

(Deposition of R. H. DeHaven.)

Mr. Donart: Yes.

Q. (By Mr. Eberle) Now, Mr. DeHaven, have you ever seen a check paid to either C. H. Kinney or A. V. Kinney, in payment of baskets sold by either of them to a grower in Idaho?

A. I have. Let me qualify that: I have never seen a check payable to—made payable to either of the Kinneys; I have seen checks in their possession.

Q. In their possession. Will you just state the circumstances?

A. Yes. I saw a check in Arthur, or A. V., Kinney's possession; rather, he showed it to me, made payable to Cummer-Graham Company by F. C. Marquardsen, I believe, at Buhl, Idaho, in payment of baskets used in the year 1939. The amount of that check was $3,506.48.

Q. Mr. DeHaven, do you know whether Cummer-Graham Company owns any stock in the Veneer Products Company?

Mr. Donart: Oh, that is objected to as incompetent and not the best evidence. The records of those two companies would be the best evidence of that.

A. I know that——

Q. (By Mr. Eberle, interposing) Well, just answer "Yes" or "No."

A. I do not know.

Q. Do you know of any record with reference to that stock or the ownership thereof?

A. No, I don't.

(Deposition of R. H. DeHaven.)

Q. Did the officers of the Cummer-Graham Company ever make any statement to you with reference to the ownership of [157] that stock?

A. They have.

Q. (By Mr. Eberle) And just state what they were and who was present.

A. What officers?

Q. Well, I say, what officers, when, and who was present.

A. I have heard general discussions about Veneer Products Company in which Mr. J. A. McGill was present, and in which Mr. C. H. Kinney was present, and myself, and other members of our firm. In that discussion it has been disclosed that C. H. Kinney, president of the Veneer Products Company, holds controlling interest of the Veneer Products Company and that he has accepted Cummer-Graham stock in payment of assets that Cummer-Graham has taken from the Veneer Products Company or acquired.

Q. Do you know—what if anything do you know about separate records being kept of the transactions of the Veneer Products Company and the Cummer-Graham Company?

A. They do not keep separate records.

Q. Do these companies make a report to you in conection with royalties due your company?

A. They do.

Q. And do they make any segregation as between the Veneer Products Company or Cummer-Graham Company?

(Deposition of R. H. DeHaven.)

Mr. Donart: Just a minute. Are those reports oral or written reports?

The Witness: Written.

Q. (By Mr. Eberle) Have you one of those reports here?

A. (Producing a document) I have. [158]

(Whereupon, a report for month of March, 1941, made to plaintiff by defendant and Veneer Products Company, was marked, "Plaintiff's Exhibit 8 for Identification.")

Q. (By Mr. Eberle) Mr. DeHaven, handing you Plaintiff's Exhibit number 8 for Identification, I will ask you what that is.

A. That is a written report made to us by the Cummer-Graham Company and Veneer Products Company. It represents the sales made in the month of March, 1941.

Mr. Eberle: I offer that in evidence.

The Witness: May I state further that it has attached the check made payable to us in payment of license fees due for the sales shown on the report, and that the attached voucher is from a Cummer-Graham check in payment of those license fees for both the Veneer Products and Cummer-Graham, which is a customary practice.

Q. Mr. DeHaven, state whether or not Mr. C. H. Kinney negotiated with dealers with reference to contracts in Idaho. A. He did.

Q. And just state when and with whom.

A. I know of two contracts that he negotiated,

(Deposition of R. H. DeHaven.)

called retail dealers' contracts. They were negotiated by him with F. H. Hogue and F. C. Hogue for the year 1939; the contracts were witnessed—the signatures were witnessed by C. H. Kinney and forwarded to Paris, Texas, to the Cummer-Graham Company and subsequently approved by an officer of that company and mailed to Straight Side Basket Corporation.

Mr. Donart: I move to strike all that part of it beginning about "signatures were witnessed," [159] and so forth, as not being responsive to any question that was asked the witness.

Mr. Eberle: Now read the question again.

(Pending question, and preceding question and answer, read).

The Witness: Do you want me to restate that.

Q. (By Mr. Eberle) Well, do you have anything to add to what you have already said?

A. No.

Q. I believe you said, Mr. DeHaven, that you were in Idaho at times when C. H. Kinney was also here? A. Yes, sir.

Q. Will you just state what you observed of Mr. Kinney's transactions or actions in connection with his business as sales manager of Cummer-Graham Company?

A. I observed that Mr. Kinney was a representative of the Cummer-Graham Company with

(Deposition of R. H. DeHaven.)

authority to act on any questionable matters. I observed that he gave——

Mr. Donart: (Interposing) Now, just a minute. I am going to move to strike that part of it about his authority to act, on the ground that's merely the witness' conclusion.

Q. (By Mr. Eberle) Just state what he did, what you saw him do.

A. I have already stated that I saw him and heard him divert cars to customers and so advise the customers that he had done so. I saw him and heard him give instructions to his brother, A. V. Kinney, who was then a salesman for Cummer-Graham Company. I saw him do many things that I can't specifically described at the moment, as being a representa- [160] tive in the territory of a firm that placed responsibility upon his shoulders.

Q. (By Mr. Eberle) Did you at any time see him contact any customers or growers using Cummer-Graham products in Idaho?

A. I have seen him talk with growers using Cummer-Graham products in Idaho?

Q. Mr. DeHaven, will you state in what state there are sold the most baskets under contract from your company, made under contract from your company? A. Idaho.

Q. And will you also tell us what types of baskets the Cummer-Graham Company make under your contract, and sell in Idaho?

A. The Cummer-Graham Company make under

(Deposition of R. H. DeHaven.)

our contracts the continuous stave three hoop straight side baskets, both in bushels and half-bushels; they make the S. I. B. type or Ideal Hamper, bushel and half-bushel; and they make the S. I. B. type pea basket. They are all sold in this state by Cummer-Graham Company.

Q. And do you know what the Cummer-Graham volume is in Idaho?

A. Yes, it's from past records, I believe it is about——

Mr. Donart: (Interposing) Just a moment, that is objected to on the ground that if he is testifying from records, the records themselves are the best evidence.

Q. (By Mr. Eberle) Do you know the approximate volume?

A. I do. It's approximately two hundred cars annually.

Q. And what would that be in dollars and cents?

A. Approximately $200,000.00 in gross business. [161]

Q. (By Mr. Eberle) Do you know whether Reilly Atkinson receives an overriding commission on all baskets sold in Idaho?

A. I have never seen Reilly Atkinson's contract, but—therefore I do not know definitely.

Q. Have you ever talked to anyone about either that contract or similar contracts in Idaho?

A. I have.

Q. And with whom?

(Deposition of R. H. DeHaven.)

A. With Mr. McGill and Mr. Kinney.

Q. And what was their statement with reference to such contracts?

A. That Reilly Atkinson receives, did receive at that time, anyway——

Q. (Interposing) When was that?

A. 1939. (Continuing former answer) ——a commission of seven per cent on all baskets sold; I should say on all baskets of a certain type sold in Idaho, whether sold by Mr. Atkinson or sold by Cummer-Graham or their representatives.

Q. Mr. Hogue referred to a Basket Sales Company, Mr. DeHaven. Will you tell hs whether you know if that company acted as an agent for Cummer-Graham Company? A. Yes, I do know.

Q. And just state in what capacity the Basket Sales Company acted.

A. As a sales organization which sold baskets for Cummer-Graham and other manufacturers.

Q. And with reference to the baskets purchased by F. H. Hogue and to which he has testified today as having been billed to him by the Basket Sales Company, Mr. DeHaven, were those Cummer-Graham baskets? [162]

A. Cummer-Graham sold through the Basket Sales Company approximately forty per cent, I believe, of the gross sales of that company; and baskets that were sold by that company went to customers all over the United States; and naturally forty per cent of those baskets, or perhaps the ratio

(Deposition of R. H. DeHaven.)

was greater than that, that were sold through that company were naturally Cummer-Graham's baskets.

Q. (By Mr. Eberle) Now, are you familiar with the F. E. Prince Company?

A. Yes, sir.

Q. Where is it located?

A. Pittsburg, Texas.

Q. And are any of the Kinneys associated with that company?

A. A. V. Kinney is general manager, and C. H. Kinney is president,—vice-president.

Q. C. H. Kinney is vice-president?

A. That's right.

Q. A. V. Kinney is general manager?

A. That's right.

Q. Are they brothers?

A. That's right.

Q. Are they sons of A. N. Kinney?

A. Sons of C. N. Kinney.

Q. Now, did the F. E. Prince Company sell any baskets in Idaho? A. They did.

Q. Have you any record of those sales?

A. I have.

Q. Where is that record? [163]

A. (Witness produces a document).

(Whereupon, two reports for the months of September and October, 1941, made to plaintiff by F. E. Prince Company, were stapled together and marked, "Plaintiff's Exhibit 9 for Identification.")

(Deposition of R. H. DeHaven.)

Q. (By Mr. Eberle) Handing you Exhibit 9, I will ask you what that is, Mr. DeHaven?

A. This is a written report signed by A. V. Kinney, who is the manager of the F. E. Prince Company, and this report represents the sales made by the F. E. Prince Company of our licensed baskets for the months of October and September, 1941. There are attached to this report a copy of a letter from the Straight Side Basket Corporation to the F. E. Prince Company dated November 5, 1941, and a letter in reply to that letter, made by the F. E. Prince Company, signed "A. V. Kinney, Manager."

Mr. Eberle: We offer this in evidence.

Now, I think that's all.

Mr. Donart: Just a question or two:

Cross Examination

By Mr. Donart:

Q. I believe you said in response to one question that there was one car of baskets sold to J. C. Palumbo; is that right?

A. That's right.

Q. That's the J. C. Palumbo whose deposition was taken a short time ago,—today—is that right?

A. Yes.

Q. At the time we were taking that deposition you were positive that there were ten or twelve cars sold to him, were [164] you not?

A. I wasn't positive.

(Deposition of R. H. DeHaven.)

Q. (By Mr. Donart) The information you had was that there were ten or twelve cars, wasn't it?

A. Mr. Palumbo had so stated.

Q. The information was that there were ten or twelve cars, wasn't it?

A. The verbal information, yes, sir.

Q. And that information was off the difference between one car and ten or twelve cars,—incorrect to that extent, was it not?

A. I believe you could say that.

Q. Well, could you say that, without choking you? A. Yes, that's correct.

Mr. Donart: That's all.

Mr. Eberle: That's all.

(Whereupon, at about 4:30 P. M. of said day, the taking of said depositions was concluded, with the understanding that certain exhibits were to be furnished by witnesses and counsel to the reporter and notary public within the next few days, to be marked and included with these depositions).

Saturday, March 21, 1942.

(Copies of reports to plaintiff from defendant and Veneer Products Company for certain months in 1939, 1940, and 1941, were this day furnished by counsel for the plaintiff and marked, "Plaintiff's Exhibit 7 for Identification." See page 72 of this transcript for stipulation.)

Friday, March 27, 1942.

(A copy of trust agreement was this day furnished by counsel for the defendant and marked, "Plaintiff's Exhibit 4 for [165] Identification." See page 51 of this transcript).

Saturday, March 28, 1942.

(A certified copy of petition for appointment of successor trustee, filed in District Court for Payette County, Idaho, on January 14, 1942, was this day furnished by counsel for the plaintiff, and marked, "Plaintiff's Exhibit 4 for Identification." See page 50 of this transcript for reference thereto).

(A certified copy of mortgage dated February 10, 1939, from F. H. Hogue and wife to J. A. McGill was this day furnished by counsel for the plaintiff, and marked, "Plaintiff's Exhibit 11 for Identification." See pages 46 and 50 of this transcript for references thereto).

[Reporter's Certificate in due form.]

[Notary's Certificate in due form.] [166]

That on Friday, March 27, 1942, not having received the contract or contracts between defendant and Frederick C. Hogue supposed to be supplied by the latter, I phoned said Frederick C. Hogue about 4:55 P. M. of said day and asked him about the matter; that said Frederick C. Hogue then stated to me that he was still unable to locate his contracts with Cummer-Graham Company, or any [167] one

of such contracts; that he had made a thorough search of his files and records, and was positive he does not have such contract or contracts in his possession.

[Endorsed]: Filed March 30, 1942. [168]

[Title of Court and Cause.]

NOTICE OF APPEAL

To Straight Side Basket Corporation, the above Named Plaintiff:

Cummer-Graham Company hereby gives notice that it hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment of the above entitled Court dated September 1, 1942, wherein judgment was entered against the defendant and in favor of the plaintiff in the sum of Sixteen Thousand Six Hundred One and 85/100 Dollars, plus costs in the amount of Two Hundred Thirty-Two and 14/100 Dollars, and from the whole of said judgment. This appeal is taken upon all questions of law and facts.

GEO. DONART, Residing at Weiser, Idaho
FREDERICK P. CRANSTON, Residing at 409 Equitable Building, Denver, Colorado
Attorneys for Defendant.

[Endorsed]: Filed Sept. 9, 1942. [172]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, a judgment has been entered in the above entitled Court in favor of the above named plaintiff and against the above named defendant in the amount of Sixteen Thousand Six Hundred One

and 85/100 Dollars, together with costs in the amount of Two Hundred Thirty-Two and 14/100 Dollars, and the defendant being desirous of appealing from said judgment to the United States Circuit Court, Ninth Circuit, desires to furnish a bond on appeal condition as required by Rule 73, Subdivision C of the Rules of Civil Procedure of the District Courts of the United States;

Now, Therefore, National Surety Corporation, a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to do a general surety business in the State of Idaho does hereby obligate itself unto the above named plaintiff in the penal sum of Two Hundred Fifty ($250.00) dollars;

The condition of this bond is such that if the defendant and appellant shall pay all costs incurred by the plaintiff and respondent on said appeal, if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if said judgment is modified, then and in that event this obligation shall be void. Otherwise the same shall remain in full force and effect.

Dated this 9th day of September, 1942.

[Seal] National Surety Corporation

By C. G. TAYLOR, Agts. and Attys. in Fact

[Endorsed]: Filed Sept. 9, 1942. [173]

[Title of Court and Cause.]

STATEMENT OF POINTS RELIED ON

Cummer-Graham Company relies upon the fol-

lowing errors and says that in the proceedings below the Court erred in the following respects:

1. The Court erred in overruling defendant's motion to dismiss.

2. The Court erred in denying motion to quash service of summons.

3. The Court erred in granting leave to the defendant to file amended complaint.

4. The Court erred in granting to plaintiff leave to amend the amended complaint in the manner set forth in notice of amendment to amended complaint dated August 1, 1942 signed by the plaintiff's attorneys.

5. The Court erred in granting motion of plaintiff for a summary judgment.

6. The Court erred in entering judgment against defendant in the sum of $16601.85 on September 1, 1942.

GEO. DONART, Residing at Weiser, Idaho.
FREDERICK P. CRANSTON, Residing at 409 Equitable Building, Denver, Colorado.
Attorneys for Defendant.

[Endorsed]: Filed September 9, 1942. [179]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Cummer-Graham Company designates the following portions of the record and proceedings to be contained in the record on appeal from judgment entered September 1, 1942, wherein the Court entered judgment in favor of plaintiff and against

defendant in the sum of Sixteen Thousand Six Hundred One and 85/100 Dollars:

1. Complaint.
2. Summons and Return of Summons.
3. Motion to dismiss.
4. Affidavit of C. H. Kinney in support of Motion to Dismiss.
5. Counter Affidavit of C. H. Kinney in support of Motion to Dismiss.
6. Amended Complaint.
7. Notice of Amendment to Amended Complaint.
8. Order of August 11, 1942, permitting Amendment to Amended Complaint.
9. Answer to Amended Complaint.
10. Adoption of Motion and Answer.
11. Motion for Summary Judgment.
12. Opinion and Order of Court dated April 15, 1942.
13. Final judgment in favor of plaintiff and against defendant.
14. Depositions of C. H. Kinney, A. V. Kinney, A. C. Mackin, Frederick C. Hogue, F. H. Hogue, Scott Brubaker, J. C. Palumbo and H. H. DeHaven. [180]
15. Notice of Appeal, Undertaking on Appeal, Statements of Points Relied On, this Designation of Contents of Record on Appeal.

GEO. DONART, Residing at Weiser, Idaho.
FREDERICK P. CRANSTON, Residing at 409 Equitable Building, Denver, Colorado.
Attorneys for Defendant.

[Endorsed]: Filed Sept. 9, 1942. [181]

[Title of Court and Cause.]

DESIGNATION BY PLAINTIFF OF ADDITIONAL MATTERS TO BE INCLUDED IN RECORD ON APPEAL

Comes now Straight Side Basket Corporation, a corporation, appellee in the above entitled cause, and designates the following additional matters to be contained in the record on appeal:

1. Affidavit of Oliver O. Haga, filed January 27, 1942, in opposition to motion to dismiss.

2. Minutes of Court on hearing in above cause, had on February 2, 1942.

3. Order extending time for taking depositions.

4. Affidavit of Oliver O. Haga, filed April 6, 1942.

5. Order of Court dated April 15, 1942.

6. Minute entry of May 7, 1942, relative to defendant's motion to dismiss.

7. Amendment to plaintiff's amended complaint. This may be substituted for notice of such amendment included in appellant's designation.

8. Minute entry of Court relative to amendment to [182] amended complaint.

Dated September 21, 1942.

RICHARDS & HAGA
Attorneys for Straight Side
Basket Corporation,
Appellee
Address: Boise, Idaho

(Affidavit of service attached.)

[Endorsed]: Filed Sept. 21, 1942. [183]

[Title of Court and Cause.]

MOTION FOR EXTENSION OF TIME FOR FILING RECORD ON APPEAL

Comes now the plaintiff by its attorneys, George Donart and Frederick P. Cranston, and moves that an extension of time to November 2, 1942 be granted for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the 9th Circuit for the following reasons:

1. Under Rule 73(g) of the Rules of Civil Procedure, this record must be filed, and the action docketed in the said Circuit Court of Appeals on or before October 19, 1942.

2. All counsel in this case are persons not having a residence in San Francisco, and it is doubtful whether the said record can be withdrawn for the purpose of preparing designation of portions of the record to be printed.

3. Counsel for defendant and appellant are not residents of Boise, Idaho, and cannot inspect the record during the course of preparation; and Frederick P. Cranston, one of the counsel for defendant and appellee, expects to perform the major portion of the work in the preparation of said designation, and desires to have the record sent to him, and to prepare said designation before causing the record to be filed in San Francisco and the action docketed in said Circuit Court of Appeals; and in order to perform the said work accurately and

properly, feels that it can be done better if it is not required to be done hastily.

4. There has been no undue delay at any stage of this proceeding upon the part of defendant or appellant.

GEORGE DONART
Of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg.,
Denver, Colorado.
Attorneys for Defendant.

[Endorsed]: Filed Oct. 5, 1942. [184]

[Title of Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of defendant it is Ordered that the time for filing the record on appeal, and docketing the action in the United States Circuit Court of Appeals for the 9th Circuit is extended to November 2, 1942.

Dated Oct. 5th, 1942.
By the Court:

CHARLES C. CAVANAH
Judge

[Endorsed]: Filed Oct. 5, 1942. [185]

[Title of Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL

In addition to the portions of the record already designated, the defendant designates the following to be included in the record on appeal:

1. Motion for extension of time for filing record on appeal.
2. Order for extension of time of record on appeal.
3. Supplemental designation.

GEORGE DONART
of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg.,
Denver, Colorado.
Attorneys for defendant.

[Endorsed]: Filed Oct. 5, 1942. [186]

[Clerk's Certificate in Due Form.] [188]

PLAINTIFF'S EXHIBIT No. 1

Sales Order
CUMMER-GRAHAM CO.
General Office Paris, Texas
Paris, Texas.....19.....

Gentlemen:

You may enter my order for the items indicated below, subject to the stipulations printed on the reverse side of this order.

To be shipped to.....
Destination.....
To be charged to.....
Address.....
To be shipped from.....
Shipping date .....
F. O. B.....Frt. allowed to.....
Terms.....
.....
(Discount allowed only on net amount of invoice)
.....
Price
.....
.....
Remarks:
.....
Subject to confirmation by general office, Paris, Texas.
Signed.....
Sold By..... By.....

PLAINTIFF'S EXHIBIT No. 2

CERTIFICATE OF RETAIL DEALER

I, the undersigned, certify that I am familiar with the foregoing excerpts from the Robinson-Patman Act, and with the obligations and liabilities of a retail dealer under this Act, and that, as a retail dealer in the sale of baskets, I will abide by the terms of said Act.

I further certify that I qualify as a retail dealer in the purchase and sale of baskets and fruit containers in that I buy for resale and am, therefore, entitled to a retail dealers discount from the manufacturer. I agree that such discount as I may receive in the purchase of baskets will be retained by me for services rendered during the calendar year of 1939.

Dated July 12, 1939.

C. H. KINNEY
Witness

F. H. HOGUE
Qualified Retail Dealer
Payette, Idaho

Approved by:

CUMMER-GRAHAM CO.
Manufacturer or Seller
H. W. NORTON, V.P.

PLAINTIFF'S EXHIBIT No. 3

[Title of District Court and Cause.]

ORDER APPOINTING TRUSTEE

On reading and filing the petition of F. H. Hogue praying for the appointment of Scott Brubaker as Trustee of an expressed trust to succeed C. N. Kinney now deceased, and it appearing from said petition and original documents presented to the Court in support thereof that on February 14,

1941, F. H. Hogue and Florence G. Hogue executed two certain trust agreements as grantors in favor of C. N. Kinney as Trustee, wherein and whereby they conveyed to the said C. N. Kinney as such Trustee the real and personal property therein described for the uses and purposes therein set forth,

And it further appearing that the said C. N. Kinney is now deceased and that said trust agreements, and each of them, by their terms and provisions provide that a successor to the said C. N. Kinney may be appointed by any Judge of the above entitled Court and that for the reasons set forth in said petition it is necessary that a successor be appointed as Trustee under said trust agreements to succeed the said C. N. Kinney, deceased, and that Scott Brubaker of Payette, Idaho, is a fit, suitable and competent person to serve as such trustee as successor to the said C. N. Kinney.

Now, Therefore, By virtue of said petition and authority so vested in me by the terms and provisions of said trust agreements, it hereby Ordered that Scott Brubaker be and he is hereby appointed Trustee of the trust created in that certain trust agreement executed by F. H. Hogue and Florence G. Hogue dated February 14, 1941, by the terms of which certain real property therein described was by the said F. H. Hogue and Florence G. Hogue conveyed to the said C. N. Kinney, trustee;

And it is further Ordered that Scott Brubaker be and he is hereby appointed Trustee of the trust created in that certain trust agreement executed by

F. H. Hogue and Florence G. Hogue dated February 14, 1941, by the terms of which certain personal property therein described was by the said F. H. Hogue and Florence G. Hogue conveyed to the said C. N. Kinney, Trustee;

And it is further Ordered that the said Scott Brubaker be and he is hereby empowered to act and continue to act as said Trustee under said trust instruments, and each of them, and to exercise all the powers and duties therein and to be provided to be executed and performed by the said Trustee.

Dated this 14th day of January, 1942.

A. O. SUTTON
District Judge.

PLAINTIFF'S EXHIBIT No. 4

TRUST AGREEMENT

Know All Men By These Presents: That we, F. H. Hogue and Florence G. Hogue, his wife, of the County of Payette, State of Idaho, hereinafter called the grantor, for and in consideration of the indebtedness herein mentioned, and in further consideration of One Dollar in hand paid to the grantor by C. N. Kinney, of the City of Denver, County of Denver, State of Colorado, hereinafter called the Trustee, the receipt whereof is hereby acknowledged, does hereby bargain, sell, convey, transfer, assign and set over unto said Trustee the following described real property situate in the

Counties of Payette, Gem and Valley, in the State of Idaho, to-wit:

Together with the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining;

Also, all right, title and interest of F. H. Hogue in and to any lease owned by the said F. H. Hogue to the above described lands and premises and any leasehold interest owned by the said F. H. Hogue in and to the following described additional property situate in the County of Malheur, State of Oregon, and in the Counties of Payette, Gem and Valley, State of Idaho, to-wit:

To Have And To Hold The same and every part thereof unto the said Trustee, and the said grantor hereby consents and agrees to and with the said Trustee that at the date hereof the said grantor F. H. Hogue is lawfully possessed of said property.

But the condition of the said assignment, transfer and sale of the said property, goods and chattels is such, that whereas, the said F. H. Hogue is justly indebted to the certain persons hereinafter called creditors, whose names with their respective addresses and with the amount owing to each is shown in affidavit hereto attached and made a part hereof, in the total amount therein named.

Now, Therefore, this instrument is executed and delivered for the purpose of securing the payment of said indebtedness on or before one day after the date hereof.

Now, Therefore, If the said F. H. Hogue shall

well and truly and promptly pay the aforesaid indebtedness on or before one day from date hereof, then these presents to be null and void—otherwise to remain in full force and effect; but the Trustee may at his option in the meantime have immediate and full possession and custody of all of said property, and it is hereby agreed that if said indebtedness shall not be paid on or before one day from the date hereof, or if default shall be made in the keeping and performance of any one or more of the covenants, conditions or agreements aforesaid, or if at any time before said indebtedness shall be fully paid, the said property, goods and chattels, or any part thereof, shall be claimed, attached or taken, or be about to be claimed, attached or taken, by any person or persons, or if at any time hereafter, before said indebtedness shall be fully paid, the said trustee shall feel insecure or unsafe in this security, then, and in any such case, the said trustee may then or at any time thereafter whether said indebtedness shall have become due and payable or not, proceed to sell the said property, or any part thereof, at public or private sale, at such time or times, on such terms, for such price or prices, in such manner, and to such person or persons as the said trustee may see fit, and he may dispose of all property above described in any manner he deems best; he may compromise or extend time for payment of choses in action, judgments, accounts and notes receivable, or he may sell them at public or private sale, or he may continue the business of

*t*rantor at retail as long as he deems it advisable for the best interests of the creditors of F. H. Hogue.

The Trustee shall exercise his best judgment in conducting the business, in selling the assets, in collecting the accounts receivable, and in converting said assets into money. He shall not be liable for any error in judgment, nor shall his acts in selling any of the assets or in collecting or compromising the bills receivable or in selling the assets subject him to any personal liability, Provided, he shall be liable and account for all money actually received by him. The money so obtained shall be deposited in a bank selected by the trustee. In case the bank in which the funds are deposited shall fail, the trustee shall not be personally liable therefor. Money on hand shall be applied to the payment of the following items in the order set forth below:

First: To pay for all expenses of trustee while conducting the business; including the merchandise purchased.

Second: To pay the expenses incidental to the negotiation, preparation and execution of this trust and for the carrying of the same into effect, including necessary attorney's fees and a reasonable compensation to said trustee for his services herein provided to be rendered, which fee shall be due and owing to trustee immediately upon acceptance of this trust.

Third: To pay any and all taxes against the

property so sold which at the time of said sale are a lien thereon, unless said property is sold subject to said taxes.

Fourth: To pay any indebtedness secured against the property sold which is senior to the indebtedness hereby secured, unless said property is sold subject to said encumbrance.

Fifth: To pay claims against F. H. Hogue of creditors listed in affidavit above described, which are wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months of the date of this instrument, not to exceed *sic* hundred ($600.00) dollars to any one person.

Sixth: The balance of funds remaining on hand after having been used for the aforesaid purposes shall be pro-rated among the other creditors of F. H. Hogue listed on said affidavit as their interests may appear, in such installments and at such times as the trustee shall think fit until all the claims of said creditors are paid in full.

Seventh: The balance of the funds remaining on hand after having been used for the aforesaid purpose shall be paid to F. H. Hogue.

The consent of every creditor named in affidavit aforesaid to this instrument is presumed and every creditor named in said affidavit shall be entitled to all benefits hereunder immediately upon delivery hereof. If any creditor shall dissent, the share to which said creditor would be entitled by the terms hereof shall be distributed pro rata to

such creditors named in affidavit aforesaid as shall consent hereto until the claims of said creditors shall be paid in full, and shall hereafter be paid to the said F. H. Hogue.

The trustee may require any creditor to file with him a sworn itemized statement showing indebtedness due from F. H. Hogue, together with any other instrument or instruments upon which the claim of said creditor shall be based. If any creditor shall object to the validity of the indebtedness claimed to be due to any other creditor, it shall file objections in writing with the trustee, and the trustee shall notify the creditor of the validity of whose claim objection has been made that said objections have been filed and shall notify said creditor that the validity of the indebtedness due from F. H. Hogue must be established in a court of competent jurisdiction and that an action for that purpose must be commenced in such a court within sixty (60) days from the date of giving said notice. In the event that such action is not commenced within said time limited, the share due to said creditor shall be distributed by the trustee in the same manner as above provided for the distribution of the share of a dissenting creditor.

I, in pursuance of the terms hereof, the said trustee shall exercise the option of holding the said indebtedness due on account of any default herein aforesaid, it shall not be necessary that such option shall be communicated to the said F. H. Hogue, but said trustee may proceed to take possession of and sell said property, as above herein provided.

F. H. Hogue nominates and appoints the trustee as his attorney-in-fact to do and perform all acts and to execute and deliver all instruments in the name of F. H. Hogue which shall be necessary or convenient for the accomplishment of the trust herein reposed to the same effect as if said acts had been done or performed or said instruments had been executed and delivered by F. H. Hogue.

In case of the death, resignation, or subsequent legal incapacity of the trustee, the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, or either of the Judges thereof, may upon application of any person interested herein, appoint a successor in trust of said trustee and upon acceptance of this trust, the trustee so appointed shall succeed to all rights and powers formerly possessed by his predecessor in trust and shall be subject to all liabilities to which said predecessor in trust was formerly liable.

This transfer is made subject to all liens and encumbrances now outstanding against the above described land.

This transfer is made also subject to the following terms and conditions, to-wit: Any creditor who signifies his assent to and acceptane of the terms and provisions of this agreement or consents to the acceptance of his portion of benefits thereunder shall be conclusively presumed to have released the said F. H. Hogue of all claims and demands of every kind and nature due and owing from the

said F. H. Hogue to such creditor, and such acceptance and/or participation in benefits shall constitute a complete release of said F. H. Hogue from all liability to said person, persons, firms or corporations who accept the terms and provisions of this instrument or any benefits hereunder.

In Witness Whereof, the grantor has caused their names to be subscribed this 14th day of February, 1941.

F. H. HOGUE
FLORENCE G. HOGUE
Grantor.

In Witness Whereof, the trustee subscribes his name and by so doing accepts this trust this 14th day of February, 1941.

C. N. KINNEY
Trustee.

State of Idaho,
County of Payette—ss.

On this 14th day of February, 1941, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared F. H. Hogue and Florence G. Hogue, his wife, and C. N. Kinney, known to me to be the persons whose names are subscribed to the foregoing and above instrument and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] SCOTT BRUBAKER,
Notary Public, Residing at Payette, Idaho.
My commission expires April 5, 1944.

PLAINTIFF'S EXHIBIT No. 5

Exhibit 5 is uniform bill of lading dated August 20, 1941, showing shipment of Vegetable Hampers from Dayton Veneer & Lumber Mills of Americus, Georgia, consigned to Cummer-Graham Co., Nampa, Idaho.

PLAINTIFF'S EXHIBIT No. 6

Exhibit 6 is invoice of Cummer-Graham Company, Paris, Texas, dated September 12, 1940, showing sale of baskets to itself, care J. C. Palumbo Fruit Co., Payette, Idaho, in amount of $500.74, and letter of J. C. Palumbo Fruit Co. to Cummer-Graham Co. dated September 23, 1940, enclosing check for $500.74 in payment for same, and another invoice dated September 5, 1940, from Cummer-Graham Co., Nineola, Texas, to itself at Nampa, Idaho, for baskets and a bill of lading covering same shipment, and a letter which should be printed.

PLAINTIFF'S EXHIBITS Nos. 7 and 8

Exhibits 7 and 8 are reports of shipments for July, August and September 1939; June and August 1940; June, August and September, October and March 1941 respectively made by Cummer-Graham Company to Straight Side Basket corporation showing 486 cars of shipments of different types of baskets. The reports list various shipments into several states of which there are shipments of only 196 cars to Idaho which were made to the following persons: To R. Atkinson Co. at following Idaho points: Allendale, Payette, Caldwell, Maising, Nampa, Meridian, Boise, Emmet, Plaza, Fruitland, Filer, Parma, Council, Homedale; to F. C. Hogue at following Idaho points: Payette, Mesa, Nampa, Emmett, Draggs, Fruitland; to F. C. Marquardson at Buhl, Idaho; to Harry Heller at Twin Falls and Filer; to H. C. Spinner at following Idaho points: Nampa, Freewater, Emmett and Homedale; and to B. G. Batt at Wilder, Idaho; and Symms Fruit Ranch, Maising and Huston, Idaho. These exhibits show one car consigned to Cummer-Graham Co. at New Plymouth, Idaho. Attached to Exhibit 8 is check as follows:

Cummer-Graham Company
General Offices
Paris, Texas

"It Pays to Pack in Wood"

Statement Accompanying Check No. 40863

Your Reference Explanation

Our Acct. Number 2701

Invoice Amount 90.47

Less Discount Net Amount

Report of Sales for the month of March, 1941.

Cummer-Graham Co. C S Tubs, 23.50 net. Cummer-Graham Co. & Veneer Prod. Co. SIB Tubs, 66.97.

Detach before depositing. The attached check is tendered in full payment of the account as shown above. Endorsement of this check constitutes our full receipt. If not correct please return both check and statement.

PLAINTIFF'S EXHIBIT No. 9

Exhibit 9 is similar record of report of F. E. Prince Co. of Pittsburgh, Texas showing 31 shipments of which 10 are to following persons in Idaho: Reilly Atkinson Co. at Nampa; Cherry Valley Wholesale Co. at Fernland; So. Idaho Fruit Co. at Nampa; Chaney Wholesale Co. at Nampa. Attached to this are letters as follows:

F. E. PRINCE CO.
Manufacturers of
Fruit and Vegetable Packages
Pittsburg, Texas
Est. 1903

Sweet Potato Crates, Vegetable Crates,
Berry Crates
Continuous Stave Tubs, Round Bottom
Baskets, Four Hoop Hampers

November 13, 1941

St. Side Basket Corp.,
Benton Harbor, Mich.

Gentlemen:

Referring to your letter of November 5th regarding our October Report.

Referring to lines 12 and 13 on our October report showing two cars shipped to Reilly-Atkinson Co., this should have shown Cummer-Graham Co. as we invoiced Cummer-Graham Co., and we will not realize the gross amount from these two cars that is shown on the report. Therefore, 3½c per dozen on the 900 dozen shown, $31.50, is correct. Please change your records accordingly.

[Pencil notation]: Changed O.K. S.

Yours very truly,
F. E. PRINCE CO.,
A. V. KINNEY,
Mgr.

AVK/r

Quotations for prompt acceptance. All agreements contingent upon strikes, accidents, transportation delays and for causes beyond our control.

November 5, 1941
F. E. Prince Company
Pittsburg, Texas

Gentlemen:

We acknowledge your September and October reports showing a total owing us of $632.13.

Your October report, lines 12 and 13, show sales amounting to $1,809.00 with a star reference prefixing an amount of $31.50. Will you please advise why this royalty amount should not show $45.23—this is a shortage of $13.73 for which we are debiting your account.

Yours very truly,
STRAIGT SIDE BASKET CORP.
By E. E. BIRKETT

EEB:EP

PLAINTIFF'S EXHIBIT No. 10

[Title of District Court and Cause.]

PETITION FOR APPOINTMENT OF SUCCESSOR

To the Honorable A. O. Sutton, one of the Judges of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette:

The petition of F. H. Hogue respectfully shows:

I.

That on or about February 14, 1941, the said F. H. Hogue and Florence G. Hogue, his wife, of

the County of Payette, State of Idaho, as grantors, executed in favor of C. N. Kinney of the City and County of Denver, State of Colorado, as grantee, two certain instruments hereinafter referred to as a trust agreement, wherein and whereby they conveyd to the said C. N. Kinney as Trustee for the uses and purposes therein stated, certain real and personal property belonging to the grantors and situate in the Counties of Payette, Gem and Valley, in the State of Idaho, and in the County of Malheur, State of Oregon;

II.

That pursuant to the terms contained in said trust agreement they conveyed said property to the said C. N. Kinney as such Trustee and the said C. N. Kinney of even date therewith executed a trust agreement by the terms and provisions of which he promised and agreed to hold said property in trust for the uses and purposes set forth in said trust agreement, notwithstanding the unconditional language contained in said deeds of conveyance.

III.

That said trust agreement and declaration of trust is presented herewith to the Court for consideration and examination;

IV.

That the said C. N. Kinney died in Denver, Colorado, on the 29th day of December, 1941, and by reason thereof, there is a vacancy in the office of

Trustee so created by the terms and provisions of said trust agreement; that said trust agreement contains the following clause, to-wit:

> "In the case of the death, resignation, or subsequent legal incapacity of the trustee, the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, or either of the Judges thereof, may upon application of any person interested herein, appoint a successor in trust of said trustee and upon acceptance of this trust, the trustee so appointed shall succeed to all rights and powers formerly possessed by his predecessor in trust and shall be subject to all liabilities to which said predecessor in trust was formerly liable."

V.

That the said F. H. Hogue is one of the persons beneficially interested in said trust agreement and as such by the terms thereof has the power of nominating and requesting the appointment of a Trustee as successor to the said C. N. Kinney;

VI.

That the said petitioner, F. H. Hogue, hereby nominates and requests the appointment of Scott Brubaker of Payette, Idaho, as Trustee of said trust agreement to succeed the said C. N. Kinney, deceased, as provided for by the terms and provisions of said trust agreement;

VII.

That the said Scott Brubaker is a resident of Payette County, Idaho, and is more familiar than any other person ith the assets of said trust estate and with the accounts and previous actions of said C. N. Kinney, now deceased, by reason of the fact that the said Scott Brubaker worked for several weeks with the said C. N. Kinney and furnished him with much of the data upon which his report and account as Trustee was based and kept;

VIII.

That C. H. Kinney, representative of J. A. McGill, and E. H. Murphy, Manager of First Security Bank of Payette, two of the principal beneficiaries under said trust, hereby join in the petition of the said F. H. Hogue and request that said petition be granted;

Wherefore, Your petitioner prays that an order of the above entitled Court be made appointing Scott Brubaker as Trustee of said trust to succeed the said C. N. Kinney, deceased, and such other and further order be made as is meet and proper in the premises.

F. H. HOGUE
Petitioner.

State of Idaho
County of Washington—ss.

F. H. Hogue, being first duly sworn, deposes and says:

That he is the petitioner above named; that he has read the above and foregoing petition, knows the contents thereof and believes the facts therein stated to be true.

F. H. HOGUE

Subscribed and sworn to before me this 13th day of January, 1942.

[Geo. Donart Notarial Seal.]

GEO. DONART

Notary Public, residing at Weiser, Idaho.

My commission expires: 3/18/44.

We, the undersigned, hereby join in the above petition and request the appointment of Scott Brubaker as prayed therein.

Dated this 13th day of January, 1942.

J. A. McGILL,
By C. H. KINNEY
Agent.

FIRST SECURITY BANK OF IDAHO
By E. H. MURPHY
Manager

[Endorsed]: Filed Jan. 14, 1942.

State of Idaho
County of Payette—ss.

I, Lillian Wilson, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, do hereby certify that the foregoing copy of Petition for Appointment of Successor in the case of "In the Matter of the Trust Agreement between F. H. Hogue and Florence G. Hogue, grantors, and C. N. Kinney, Trustee," has been by me compared with the original and that it is a true and correct copy thereof, and of the whole of such original as the same appears on file at my office, and in my custody in Case No. 2107.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 23rd day of March, 1942.

[Seal] LILLIAN WILSON
Clerk of the District Court

PLAINTIFF'S EXHIBIT No. 11

Instrument No. 43951

This Indenture, Made the 10th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, between F. H. Hogue and Florence G. Hogue, his wife, of Payette, County of Payette, State of Idaho, the party of the first part, and J. A. McGill of Paris, County of _____, State of Texas, the party of the second part:

Witnesseth, That the said parties of the first part,

for and in consideration of the sum of Thirty-three thousand, six hundred ninety-four and no/100 Dollars, lawful money of the United States, do by these presents Grant, Bargain, Sell and Convey, unto the said party of the second part, and to his heirs and assigns, Forever, all that certain real property situate in the County of Payette and State of Idaho and bounded and particularly described as follows, to-wit:

A part of the SE¼ of the SE¼ of Section 22, Township 8 North, Range 5 West of the Boise Meridian, particularly described as follows, to-wit: Beginning at a point located 518 feet West and 25 feet North of the SE corner of said Section 22 and running thence West 150 feet; thence North 230 feet; thence East 83 feet, more or less, to the Westerly side line of right of way of the Payette Valley Branch of the Oregon Short Line Railroad; thence in a southerly direction along said right of way to the place of beginning.

The North Half of the Northeast Quarter of the Southwest Quarter and the North Half of the South Half of the Northeast Quarter of the Southwest Quarter of Section Twenty-seven, Township Eight North of Range Five West of the Boise Meridian, except: Beginning at the Southeast corner of the North 30 acres of the Northeast Quarter of the Southwest Quarter of Section 27, Township 8 North of Range 5 West of the Boise Meridian; thence West 242

feet to a waste ditch; thence in a Northeasterly direction along said waste ditch 250 feet; thence East 60 feet to the center of the road; thence South 176 feet to the place of beginning. Together with 30 shares of the capital stock of Farmers Co-Operative Irrigation Company Limited.

The West half of the South half of Southwest quarter of the Northwest quarter and the North half of the Southwest quarter of the Northwest quarter of Section one Township Six North of Range Two West B.M. (Situate in the County of Gem, State of Idaho.)

Lots 7, 8, 9 and 10 of Block 3, and the North 24.5 feet of Lot 1, and the South 23.5 feet of Lot 2, and all of Lot 3 in Block 2, all in Masters Addition to Payette, Idaho, according to the plat thereof filed January 10, 1887, and all being in lot 2 of Sec. 33, Twp. 9 N. R. 5 West of Boise Meridian; also, Block 1, 2, 3, 4 and 7 of Recorder's First Addition to Payette, Idaho; also, Block 5 of said Recorder's First Addition, except the following, to-wit: Beginning at a point 24.5 feet South of the Northeast corner of said Block 5, thence West 25 feet; thence South 12 feet; thence East 25 feet; thence North 12 feet to the place of beginning; also Block 6 of said Recorder's First Addition, except the following, to-wit: Beginning at a point 24.5 feet South of the Northeast corner of said Block 6; thence West to the right-of-way of the

Oregon Short Line Railroad; thence South 24 degrees 20 minutes West along said right-of-way 39 feet to the Southwest corner of said Block 6; thence East 40 feet; thence North 23.5 feet; thence East to the East side line of said Block 6; thence North 12 feet to the place of beginning; Also, Beginning at the Northeast corner of Block 4 of Recorder's First Addition to Payette, Idaho, thence East 75 feet, thence South 50 feet, thence West 75 feet, thence North 50 feet to the place of beginning; also, beginning at the Southeast corner of Block 4 of Recorder's First Addition to Payette, Idaho, thence East 75 feet, thence North 50 feet, thence West 75 feet, thence South 50 feet to the place of beginning.

And also the following described lands and premises situate in the County of Gem, State of Idaho:

The Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) and the Northwest Quarter (NW¼) of the Southeast Quarter (SE¼) of Section three (3), Township Six (6) North, Range Two (2) West, B.M., also

Commencing at the quarter corner between sections three (3) and four (4), Township Six (6) North, Range Two (2) West of the Boise Meridian; running thence Easterly along the center line of said section three (3), following the center of the public highway a distance of two thousand three hundred twenty-seven (2327)

feet, more or less, to a point; thence Northerly twenty-five (25) feet to the North line of said highway to a point, which point is the real place of beginning; thence Easterly along the North line of said highway a distance of five hundred ninety-seven and seventy-two hundredths (597.72) feet to a point on the bank of a small lateral; thence North forty-eight (48) degrees forty-nine (49) minutes West a distance of five hundred ninety-five (595) feet, parallel to and on the Southwesterly side of said lateral to a point at the intersection with a second lateral running Southwesterly; thence South twenty (20) degrees fifty-eight (58) minutes West a distance of four hundred nineteen (419) feet, parallel to and on the Easterly side of said second lateral to the real place of beginning, and containing two and seven-tenths (2.7) acres, more or less; and commonly called the "Pierce Orchard."

There is also mortgaged all fixtures, machinery and equipment now kept and being in any dryers or dehydrating plants situate on any part of the above described premises, and all fixtures, machinery and equipment hereafter acquired and installed thereon during the life of this mortgage, which fixtures, machinery and equipment the mortgagors hereby covenant and agree are affixed to and shall be conclusively presumed to constitute a part of the real property hereinabove described.

together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This Grant is intended as a Mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said F. H. Hogue to the said party of the second part, true copy of which said promissory note is in the words and figures following, to-wit:

PROMISSORY NOTE

$33,694.00 Payette, Idaho, February 10, 1939

For Value Received, I promise to pay to the order of J. A. McGill at Paris, Texas, the sum of Thirty-three thousand, Six hundred ninety-four and no/100 ($33,694.00) Dollars in lawful money of the United States of America, with interest thereon or on so much thereof as may from time to time remain unpaid, at the rate of 6% per annum payable annually from date. The principle sum of this note is payable in installments in the amount and at the times hereinafter specified, to-wit:

$5,000.00 on or before November 1, 1939
$5,000.00 on or before December 15, 1939
$3,423.00 on or before January 15, 1940
$3,424.00 on or before March 1, 1940
$5,000.00 on or before November 1, 1940
$5,000.00 on or before December 15, 1940
$3,323.00 on or before January 15, 1941
$3,324.00 on or before March 1, 1941
$ 200.00 on or before March 1, 1942

If any installment of either principal or interest shall not be paid at the time the same becomes due as hereinbefore specified, then the holder of this note may, at his option, declare the entire unpaid balance of principal and interest immediately due and payable without notice to the maker of this note, and may institute all necessary and proper actions for the collection thereof.

In case suit or action is instituted to collect this note, or any part thereof, I promise to pay, besides the costs and disbursements allowed by law such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

F. H. HOGUE

And These Presents Shall Be Void if such payment be made. But in case default shall be made in the payment of said principal sums of money, or any part thereof as provided in the said note, or if the interest be not paid as therein specified, then it shall be optional with the said party of the second part, his executors, administrators or assigns, to consider the whole of said principal sums expressed in said note, as immediately due and payable, and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure suit, including a reasonable sum to be fixed by the court as counsel fees and

also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second party, his heirs, executors, or assigns, with interest on the same, rendering the over-plus of the purchase money (if any there shall be) unto the said parties of the first part their heirs, administrators, executors or assigns.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the Presence of

F. H. HOGUE (Seal)
FLORENCE G. HOGUE (Seal)
(Seal)
(Seal)

State of Idaho
County of Payette—ss.

On this 15th day of February in the year 1939, before me, the undersigned, a Notary Public in and for said County, personally appeared F. H. Hogue and Florence G. Hogue, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

SCOTT BRUBAKER
Notary Public.

[Scott Brubaker Notarial Seal]

My Commission expires May 5, 1940.

State of Idaho
County of Payette—ss.

I hereby certify that this instrument was filed for record at the request of Jack Hogue at 45 minutes past 10 o'clock A.M., this 15 day of March, 1939 in my office, and duly recorded in Book 13 of Mortgages at page 575.

LILLIAN WILSON
Ex-Officio Recorder
By LOIS BOOMER
Deputy

Fees, $3.40

State of Idaho
County of Payette—ss.

I, Lillian Wilson, Ex-Officio Recorder of Payette County, State of Idaho, do hereby certify that the foregoing copy of Mortgage has been by me compared with the recorded copy of the original Mortgage and that it is a true copy thereof, and of the whole of such recorded copy of the original as the same appears of record at my office, and in my custody in Book 13 of Mortgages at page 575.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 23rd day of March, 1942.

[Seal] LILLIAN WILSON
Ex-Officio Recorder.

[Endorsed]: No. 10279. United States Circuit Court of Appeals for the Ninth Circuit. Cummer-Graham Company, a corporation, Appellant, vs. Straight Side Basket Corporation, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed October 9, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
of the Ninth Circuit
No. 10279

CUMMER-GRAHAM COMPANY,
a Corporation, Appellant,

vs.

STRAIGT SIDE BASKET CORPORATION,
Appellee.

ADOPTION OF STATEMENT OF POINTS RELIED ON

The Appellant adopts the Statement of Points Relied on filed in the District Court as its Statement of Points Relied on in this Court.

GEORGE DONART
of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg., Denver, Colorado.
Attorneys for Appellant.

I certify that I have served a copy of the within Adoption of Statement of Points Relied On upon Richards & Haga, Attorneys for Appellee, by depositing in the Post Office at Denver, Colorado, with postage thereon prepaid, a copy of said Adoption of Statement of Points Relied On addressed to Richards & Haga at their address at Boise, Idaho on October 22, 1942.

FREDERICK P. CRANSTON,
One of the Attorneys for
Appellant.

[Endorsed]: Filed Oct. 26, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD TO BE PRINTED

Cummer-Graham Company designates the following portions of the record and proceedings to be printed:

1. Complaint.
2. Summons and Return on Service of Writ.
3. Motion to Dismiss.
4. Affidavit of C. H. Kinney.
5. Affidavit in Opposition to Motion to Dismiss.
6. Counter Affidavit in Support of Motion to Dismiss.
7. Minutes of Court of February 2, 1942.
8. Amended Complaint.
9. Affidavit of Oliver O. Haga.

10. Opinion of April 15, 1942.

11. Order of April 15, 1942.

12. Order of May 7, 1942.

13. Answer to Amended Complaint.

14. Motion for Summary Judgment under Rule 56.

15. Amendments to Amended Complaint and Order.

16. Order Allowing same to be made.

17. Adoption of Motion and Answer.

18. Summary Judgment.

19. Depositions of C. H. Kinney, A. V. Kinney and A. C. Mackin.

20. Notice of Appeal.

21. Notation that Undertaking on Appeal for $250.00 filed September 9, 1942.

22. Statement of Points Relied On.

23. Designation of Contents of Record on Appeal.

24. Designation by plaintiff of Additional Matters to be Included in Record on Appeal.

25. Motion for Extension of Time for Filing Record on Appeal.

26. Order for Extension of Time.

27. Supplemental Designation of Contents of Record on Appeal.

28. Print following notation—"Clerk's Certificate in due form."

29. Print Depositions of Frederick C. Hogue, Scott Brubaker, J. C. Palumbo and R. H. DeHaven up to Reporter's Certificate on p. K-82, and then

a. Print following notation—"Reporter's Certificate in due form."

b. Print following notation—"Notary's Certificate in due form."

c. Print Exhibit 1.

d. Print portion of Exhibit 2 beginning with paragraph commencing "We the undersigned" and continuing to end of Exhibit.

e. Print Exhibit 3.

f. Print Exhibit 4.

g. Print following notation—"Exhibit 15 is uniform bill of lading dated August 20, 1941, showing shipment of Vegetable Hampers from Dayton Veneer & Lumber Mills of Americus, Georgia, consigned to Cummer-Graham Co., Nampa, Idaho."

h. Print following notation—"Exhibit 6 is invoice of Cummer-Graham Company, Paris, Texas dated September 12, 1940 showing sale of baskets to itself, Care J. C. Palumbo Fruit Co., Payette, Idaho, in amount of $500.74, and letter of J. C. Palumbo Fruit Co. to Cummer-Graham Co. dated September 23, 1940 enclosing check for $500.74 in payment for same, and another invoice dated September 5, 1940 from Cummer-Graham Co., Nineola, Texas, to itself at Nampa, Idaho, for baskets and a bill of lading covering same shipment, and a letter which should be printed."

i. Print following notation—"Exhibits 7 and 8 are reports of shipments for July, August and September 1939; June and August 1940; June, August and September, October and March 1941 respec-

tively made by Cummer-Graham Company to Straight Side Basket corporation showing 486 cars of shipments of different types of baskets. The reports list various shipments into several states of which there are shipments of only 196 cars to Idaho which were made to the following persons: To R. Atkinson Co. at following Idaho points: Allendale, Payette, Caldwell, Maising, Nampa, Meridian, Boise, Emmet, Plaza, Fruitland, Filer, Parma, Council, Homedale; to F. C. Hogue at following Idaho points: Payette, Mesa, Nampa, Emmett, Draggs, Fruitland; to F. C. Marquardson at Buhl, Idaho; to Harry Heller at Twin Falls and Filer; to H. C. Spinner at following Idaho points: Nampa, Freewater, Emmett and Homedale; and to B. G. Batt at Wilder, Idaho; and Symms Fruit Ranch, Maising and Huston, Idaho. These exhibits show one car consigned to Cummer-Graham Co. at New Plymouth, Idaho. Attached to Exhibit 8 is check as follows—"Copy check attached to Exhibit 8 in full."

j. Print following notation—"Exhibit 9 is similar record of report of F. E. Prince Co. of Pittsburg*h*, Texas showing 31 shipments of which 10 are to following persons in Idaho: Reilly Atkinson Co. at Nampa; Cherry Valley Wholesale Co. at Fernland; So. Idaho Fruit Co. at Nampa; Chaney Wholesale Co. at Nampa." Attached to this are letters as follows—Print letters attached to Exhibit 7.

k. Print Exhibit 10.

1. Print Exhibit 11.
30. Adoption of Statement of Points Relied On.
31. This designation.

GEORGE DONART
of Weiser, Idaho.
FREDERICK P. CRANSTON
of 409 Equitable Bldg., Denver, Colo.,
Attorneys for Appellant.

I certify that I have served a copy of the within designation upon Richards & Haga, Attorneys for Appellee, by depositing in the Post Office at Denver, Colorado, with postage thereon prepaid, a copy of said Designation addressed to Richards & Haga at their address at Boise, Idaho on October 22, 1942.

FREDERICK P. CRANSTON
One of the Attorneys for
Appellant.

[Endorsed]: Filed Oct. 26, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PARTS OF RECORD TO BE PRINTED

Straight Side Basket Corporation, Appellee on the above appeal, is in doubt as to the identity of certain documents referred to in the Designation

made by appellant of portions of record to be printed because there were several matters designated which required the date of the affidavit or the orders or minutes for proper identification. Appellee does not desire that any document or instrument should be printed more than once in the record, but in view of the uncertainty as to what documents are covered by appellant's Designation appellee especially requests that the following documents or matters be included in the printed record:

1. Affidavit of Oliver O. Haga, filed January 27, 1942.
2. Affidavit of Oliver O. Haga filed April 6, 1942.
3. Minute entry in court record of May 7, 1942.
4. Minute entry of court relative to amendment to amended complaint made on or about August 11, 1942.
5. Deposition of F. H. Hogue.
6. Following the notation requested by appellant in its Designation No. 29B after the words "Notary's Certificate in due form" insert the following:

The Notary's Certificate, among other things, contains the following statement:

> "That on Friday, March 27, 1942, not having received the contract or contracts between defendant and Frederick C. Hogue supposed to be be supplied by the latter, I 'phoned said Frederick C. Hogue about 4:55 P.M. of said day and asked him about the matter;
>
> That said Frederick C. Hogue then stated to me that he was still unable to locate his con-

tract with Cummer-Graham Company, or any one of such contracts; that he had made a thorough search of his files and records, and was positive he does not have such contract or contracts in his possession."

In view of the fact that the exhibits referred to in appellant's designation have been sent by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals, appellee has had no opportunity to check the synopsis of such exhibits which appellant requests be printed and appellee is accordingly unable to determine whether there are other parts of such exhibits material to appellee's case on appeal. Appellee, therefore, reserves the right to refer in its brief and on the oral argument to anything contained in the exhibits and record material to its appeal, even though not included in the printed record, and to have such parts printed, if required by the court, in a supplemental record, at appellant's expense.

OLIVER O. HAGA
J. L. EBERLE
RICHARDS & HAGA
Attorneys for Appellee Straight Side Basket Corporation
Residence: Boise, Idaho

I hereby certify that on October 28, 1942, I served a copy of the within Designation upon George Donart, Esq., whose post office address is Weiser, Idaho, and one copy thereof on Frederick P. Crans-

ton, Esq., whose post office address is 409 Equitable Building, Denver, Colorado, attorneys for appellant, by depositing in the post office at Boise, Idaho, said copies enclosed in an envelope addressed to the said attorneys for appellant, with the necessary postage thereon prepaid.

OLIVER O. HAGA

[Endorsed]: Filed Nov. 2, 1942.

No. 10279

2

United States

Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

GEORGE DONART,
Weiser, Idaho,

FREDERICK P. CRANSTON,
409 Equitable Bldg.,
Denver, Colorado,
Attorneys for Appellants.

PEERLESS PRINTING CO., DENVER

No. 10279

United States

Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

GEORGE DONART,
Weiser, Idaho,

FREDERICK P. CRANSTON,
409 Equitable Bldg.,
Denver, Colorado,
Attorneys for Appellants.

INDEX

Index—Continued Page

TABLE OF CASES

Table of Cases—Continued Page

TABLE OF STATUTES

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

GEORGE DONART
Weiser, Idaho

FREDERICK P. CRANSTON
409 Equitable Building
Denver, Colorado,

Attorneys for Appellant.

RICHARDS & HAGA
Boise, Idaho,

Attorneys for Appellee.

IN the District Court of the United States
for the District of Idaho,
Southern Division

No. 2152

THE STRAIGHT SIDE BASKET CORPORATION, a corporation,

Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,

Defendant.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT.

Appellant, the defendant below, has maintained from the beginning, that the District Court had no jurisdiction. Appellee, the plaintiff, below, asserts that it had. The parties will be referred to as plaintiff and defendant, the positions they occupied below.

The complaint alleges that plaintiff is a Michigan corporation, and defendant a Texas corporation, and that the matter in controversy exceeds $3,000 (p. 2). The defendant has not controverted these facts. Summons was served in Idaho upon C. H. Kinney as defendant's Salesmanager (p. 6).

The claim for which relief was sought was for royalty payments under license agreements for patented ma-

chinery leased to defendant (p. 21). There is no allegation that the manufacturing was done in Idaho, but merely that some of the manufactured product was sold in Idaho (p. 23), but the evidence showed that although Idaho was an important market, it was not the largest market (pp. 64 and 65).

Defendant filed motion (a) to dismiss on the grounds that the action had been brought in the wrong district (p. 6) and (b) to quash service of summons because the service of summons did not constitute proper service (p. 7). Affidavits and counter affidavits were filed in support of and in opposition to said motions; depositions were taken and the amount prayed for (which at all times was in excess of $3,000) was increased by amendments filed by leave of Court asserting indebtedness later alleged to have accrued. The Court overruled the motion to dismiss on both grounds (p. 33). Defendant answered, refusing to plead to the merits (p. 36) and denying that it at any time had done or was doing business in Idaho (p. 34); that it had not qualified to do business therein (p. 34), and that the venue was improper (p. 34); and denied facts which plaintiff had alleged as grounds for jurisdiction (pp. 34 to 36). A motion for summary judgment was filed (p. 37) and granted, and judgment for the amount sought against plaintiff was entered (pp. 42, 43).

The action being between citizens of different states and involving more than $3,000, the subject matter is within the jurisdiction of the United States Courts under 28 U.S. Code, Sec. 41. Plaintiff asserted that it was within the jurisdiction of the United States District Court for the District of Idaho. Defendant asserted that

the venue in such court was improperly laid and that it was not within such Court's jurisdiction. The applicable statute is 28 U.S. Code, Sec. 112:

> "Except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any District Court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This Court has jurisdiction to review the judgment under 28 U.S. Code, Sec. 225 (a) First.

CONCISE ABSTRACT AND STATEMENT OF THE CASE PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The plaintiff is a Michigan corporation, and the defendant a Texas corporation. Defendant contends it is not subject to suit in the United States District Court for the District of Idaho, because Idaho is the residence of neither the plaintiff nor the defendant, and further that service upon the alleged Agent served was not proper service. Plaintiff contends that the defendant was doing business in Idaho, and thereby waived the privilege of objecting to the venue as laid. Defendant contends that it was not doing business in Idaho and hence the privilege of objecting on the ground of improper venue was not waived; and that even if it were so doing business,

the privilege of making such objection was not waived; and that service of process was not properly made. Accordingly, the primary issues are:

1. Was the venue properly laid in the United States District Court for the District of Idaho?

2. Was service properly made upon defendant by service upon its Salesmanager, then in Idaho?

There is no substantial controversy as to the facts. Except as to certain details, what the defendant did or did not do relative to whether or not it was doing business in Idaho is not in dispute. The question is:

1. Even if defendant were doing business in Idaho, does such constitute a waiver of the privilege of objecting to the improper venue?

2. Do the facts establish as a matter of law that the defendant was doing business in Idaho?

3. Was service properly made upon defendant's Salesmanager?

Plaintiff maintains, and the Court held, that all of these questions should be answered in the affirmative. Defendant maintains that all should be answered in the negative, and that the Court's ruling was erroneous. If any question should be answered in the negative the judgment below should be reversed. These questions were presented by the motion to dismiss (pp. 6 and 7) by the answer (pp. 33 to 36) and by plaintiff's motion for summary judgment (p. 37). The ruling upon each was in favor of plaintiff's position.

No matter of fact asserted by defendant has been di-

rectly denied by plaintiff. Only the legal effect thereof is in controversy. The material facts are few and simple, and will be stated in logical order rather than in the order in which they appear in the record.

Cummer-Graham Company is a Texas corporation with its principal office in Paris, Texas (pp. 48, 192, 206). Among other products, it manufactures baskets used for the shipment of fruit. It has bought at times baskets from other manufacturers, but in 1940 and 1941 none were bought for sale in Idaho (p. 64) except that there is a record of one purchase from a manufacturer in Georgia (p. 204). Its largest sales are in Texas (p. 64). Idaho and Colorado constitute the largest western market (p. 65). These two states purchase about equal amounts (p. 65). The Board of Directors in Texas controls general policies (p. 54). At the time this action was commenced on October 21, 1941, it had no office in Idaho (p. 9), and never had had any office there except at one time for less than three months (p. 80) in 1940 or earlier (p. 79) which was at least one season prior to the commencement of this action when one of its then salesmen had an office in its distributor's warehouse in Payette (p. 80). It carried no stock of merchandise in Idaho (p. 34), and except as above had no office there (p. 51). It had not qualified as a foreign corporation in Idaho, and had appointed no Agent for service of process in accordance with the Idaho statute (p. 34). Its Salesmanager who covered Idaho and twenty-six other states (p. 46), did not spend over sixty days in any one year in Idaho (p. 36). The Salesmanager was not an officer nor a Director of the company (pp. 36, 47). He assisted local distributors in sales work (p. 46). Sometimes he

received checks on accounts receivable which he forwarded to the defendant's principal office in Texas (p. 55). He never was directed and never had authority to make adjustments of accounts (p. 96) nor to pass upon credits or contracts (p. 69). Credits were approved at the defendant's principal office, generally in advance of his trips. In other years other representatives had been in Idaho on company business (p. 56) but in October, 1941, C. H. Kinney was the only one. All orders had to be approved at the office in Paris, Texas (pp. 54, 94, 192, 193). The policies were approved at the beginning of the season by the directors in Paris, Texas, and any change had to be approved by them (p. 54). All orders were filled by shipment into Idaho from other states (pp. 34, 35, 70, 71). Plaintiff attempted to show that some shipments were made to growers, but the instances mentioned were in reality sales handled through one of the distributors (pp. 96, 97). What difference it would have made whether a sale was to a distributor or to a grower has not been indicated by plaintiff. At any rate, under the rule hereafter to be discussed, the evidence most favorable to the party against whom a summary judgment is entered must be accepted as true. Such contracts as were made with Idaho customers were signed by the customers, apparently in Idaho, but were forwarded to Texas for signature by defendant's officers (p. 177) and under well established rules, such contracts would thus have been made in Texas, not in Idaho.

The defendant contended that the plaintiff was doing business in Idaho at the time of the commencement of the action on account of the following facts:

The plaintiff made sales in Idaho in the following

manner: Prior to 1936 the plaintiff and other Texas manufacturers sold their products through the Baskets Sales Company. That company ceased operations, and the plaintiff handled its own sales. Its sales were, except for a few shipments made through two distributors, Reilly Atkinson of Boise, and F. C. Hogue of Payette (p. 55). Although sometimes referred to as "Agents" they were in effect wholesale distributors. The word "Agent" as applied to them did not mean Agent in the legal sense, but meant "customer" (pp. 34, 72, 73). Distributors would sell in turn to other customers, either the growers or packers of the fruit which would be shipped in the containers. Defendant in 1941 did not sell any baskets to growers (p. 63). A few sales to growers were shown in other years. Defendant's representatives would assist the distributors in making sales to their customers (p. 46). The distributors received 7% of the price ultimately paid by their customers (p. 138). A few cases were shown prior to 1941 of sales apparently made by plaintiff to others without going through the distributors, but no such sales were shown in 1941. The distributors assumed their own credit risks (pp. 107, 117).

Due to the fact that fruit is perishable and must be moved quickly when ready for shipment (p. 70), and that requirements for containers could not be exactly known in advance (p. 77), it was the practice for plaintiff to ship cars of baskets from Texas (pp. 70, 71) and in one instance from Georgia (p. 204) which distributor F. C. Hogue received (p. 155). These cars would be consigned by defendant to itself in care of one of its distributors, either Reilly Atchinson Company or F. C. Hogue (pp. 67, 86) at some Idaho point, usually Nampa.

None of these cars were delivered to defendant (pp. 35, 50) and there was no knowledge of any practice of consigning any car except in care of a distributor (pp. 133, 134). These cars, commonly called "rollers" (p. 70), might then be diverted by the customer to some other point where the customer would accept delivery, or with his consent (p. 75) if he wished the car to go direct to his customer. If the distributor happened to be overloaded, the car would be sold to the other distributor either at the destination to which the car had been consigned or at some other point (p. 113). There was no evidence of a car being opened, or of any interruption in the interstate shipment. Efforts were made to avoid demurrage (p. 115) which indicates continuous travel of the car and no use of the car for warehousing purposes. Sometimes a car consigned to a destination in Washington would be stopped in Idaho (p. 122), all depending upon the requirements of the particular distributors and the packing of the crops at particular points (pp. 113, 114, 115). Sometimes this diversion was handled by defendant at its Texas office. Only if the sale and credit had previously been approved by defendant's Board of Directors, would defendant's representative, if in Idaho, authorize a diversion (p. 72). When a car left Texas consigned to plaintiff in care of one distributor, the car was charged on plaintiff's books to the distributor (pp. 71, 86). If he eventually took the car, the charge remained. If the other distributor took the car, the first distributor was credited and the other distributor was charged with the amount (p. 71).

In the event that one distributor bought a larger amount of baskets than could be sold during the season,

it was often customary for such baskets to be carried over until the next season (p. 87). The distributor, in said case, held the baskets in his warehouse and paid all storage and insurance charges (pp. 62, 87, 125). While the charge for purchase price of such baskets remained unchanged, and the account was still owing, it was the custom of plaintiff to carry the account receivable until the following season under a good faith agreement whereby the baskets would stand as collateral security but there would be no chattel mortage executed (p. 61). During the next season the baskets would be sold by the distributor, and the account paid. There was considerable confusion in the testimony as to whether or not the baskets belonged to defendant (p. 126) and as to what the situation would be if a fire destroyed the baskets or the price changed, whether remittance would be made on the old or on the new price. The final answer obtained was that it was not known because it had not happened (pp. 62, 129, 130, 139, 140). Any doubt as to the effect of the situation, as above stated and as will hereafter be shown must be resolved in favor of the construction which favors defendant. This rule is emphasized by the further fact that the witnesses whose depositions were taken regarding this situation were plaintiff's witnesses and plaintiff is in no stronger position of certainty than their uncertainty as to the effect of their arrangement. The failure of plaintiff's own witnesses to produce a contract, setting forth the definite arrangement indicates that the plan was a matter of custom or verbal understanding rather than any written agreement.

When a shipment is made from Texas to a distributor in Texas whether by roller car or otherwise, the freight is not prepaid but is paid by the distributor upon accepting delivery in Idaho (p. 138). The 7% commission is computed upon the ultimate sale price less the freight (p. 138).

When the Basket Sales Company discontinued business, F. H. Hogue (not F. C. Hogue (p. 60) the distributor above named) was indebted to the Basket Sales Company (p. 58). This indebtedness in 1938 was placed in the form of a promissory note payable to the order of J. A. McGill, the President of plaintiff, and was secured by a mortgage on real estate in Payette County, Idaho (p. 147). F. H. Hogue then executed an instrument subject to above mortgage (p. 147) to secure his other creditors to C. N. Kinney, the father of C. H. Kinney (p. 56), plaintiff's Salesmanager, but who at no time was connected with plaintiff (p. 57). This instrument although referred to as an assignment for benefit of creditors (p. 57) was in the nature of a mortgage of F. H. Hogue's equity in the property of a Trustee for the benefit of theretofore unsecured creditors (p. 197). C. N. Kinney operated the property but leased the property secured by the McGill mortgage to McGill during the Year 1941. Upon the death of C. N. Kinney, Scott Brubaker was appointed Trustee in place of C. N. Kinney (p. 78) by the District Court of Payette County, Idaho. The defendant had no interest in this property (pp. 57, 59), did not sign the trust agreement (p. 57) and it did not appear as an asset upon its books (p. 92).

SPECIFICATION OF ERRORS RELIED UPON

The errors relied upon all relate to the same general issue. (a) Was defendant doing business in Idaho at the time of the commencement of the action? (b) If so, does such fact constitute a waiver of the privilege of objection to the improper venue? and (c) was defendant properly served with summons. Since the Court made several rulings at different stages of the proceeding, the errors relied upon are as follows:

1. The Court erred in overruling defendant's motion to dismiss.

2. The Court erred in denying defendant's motion to squash service of summons.

3. The Court erred in granting motion of plaintiff for summary judgment.

4. The Court erred in entering judgment against defendant in favor of plaintiff on September 1, 1942.

ISSUES

Under the language of 28 U.S. Code, Sec. 112, the proper venue of an action between citizens of different states is clearly and unambiguously set forth as the district of the residence of either the plaintiff or the defendant. The district of Idaho is clearly not such district and under the earlier decisions the right to dismissal would have been clear. Plaintiff however contends that later decisions have held that a corporation domiciled in one state which does business in another state submits itself to the jurisdiction of the courts of that state which include the Federal Courts, and that

such doing business constitutes a waiver of the privilege of having the venue laid in the district of residence of either the plaintiff or the defendant.

The issues accordingly are:

1. Does the doing of business in a state without qualifying as a foreign corporation constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in such state?

2. Under the facts in this case was defendant doing business in Idaho?

a. Does solicitation by an unqualified foreign corporation of orders within the state to be confirmed outside of the state for sales of merchandise to be shipped in interstate commerce into the state constitute the doing of business in the state?

b. Does the collection by a foreign corporation of its accounts receivable in the state constitute the doing of business within the state?

c. Does the shipping of goods by a foreign corporation in interstate commerce into the state to be sold on consignment with title retained by the consignor constitute the doing of business within the state?

d. Does the holding by a foreign corporation of security or some interest in real estate as an incident to collecting an account receivable or to the sale of merchandise constitute the doing of business within a state?

3. Was service properly made upon the defendant?

The defendant asserts that all of said questions must be answered in the negative. If either of the first two main issues shall be answered in the negative, the granting of the motion for summary judgment was error and the motion to dismiss should have been granted. If the third issue should have been answered in the negative, the motion to quash service of summons should have been granted.

Before entering upon the main argument, it is important to state

THE RULE APPLICABLE TO SUMMARY JUDGMENTS.

The motion for summary judgment by its terms (p. 37) raised only questions of law and was in effect a motion for judgment on the pleadings under the former procedure. The motion can be granted only if there is no controversy as to facts. Therefore as to details in the facts where there is some discrepancy or uncertainty, the position most favorable to the party against whom the summary judgment is sought to be entered must be accepted as true. If there is any uncertainty it was error to grant the motion. This is the holding of *McElwain v. Wickwire Spencer Steel Co.,* 126 F(2d) 210, 211, decided in 1942 wherein the Circuit Court of Appeals for the Second Circuit said:

> "With the material fact as to whether or not the appellant had been exposed to a dust hazard during the time he worked for the appellee after September 1, 1935 left as uncertain as it was, it was error to

> grant the motion for summary judgment. Rule 56(c) F.R.C.P. provides for the entry of a summary judgment 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Where there is a substantial dispute as to a material fact it cannot be said that the only issue is one of law. Houghton Mifflin Co. v. Stackpole Sons, Inc., et al., 2 cir., 113 F. 2d 627; Whitaker v. Coleman, 5 cir., 115 F. 2d 305; Miller v. Miller, App. D.C., 122 F. 2d 209."

Accordingly, where there is any discrepancy or uncertainty, the doubt must be resolved in favor of defendant, and any evidence supporting defendant's position must be accepted as true.

THE DOING OF BUSINESS IN A STATE WITHOUT QUALIFYING AS A FOREIGN CORPORATION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT TO OBJECT TO IMPROPER VENUE IN AN ACTION BROUGHT TO ENFORCE A CONTRACT NOT MADE IN AND NOT TO BE PERFORMED IN SUCH STATE.

The language of 28 U.S. Code, Sec. 112, clearly states that an action in the United States Courts lies only in the district of the residence of either the plaintiff or the defendant. This provision at one time read that the venue might be laid in the district where the defendant might be found. Cases under such statute are therefore not in point, but since 1888 the statute has confined the

venue to the residence of either that of plaintiff or the defendant. The case of *In Re Keasbey and Mattison Company,* 160 U.S. 221, 231; 16 S.Ct. 273, 40 L.Ed. 402 States:

> "The defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the Circuit Court."

Such has been the law in all cases until the Supreme Court in the case of *Neirbo v. Bethlehem Ship Building Corporation,* 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 held that by qualifying as a foreign corporation and *appointing* agent for service of process, the corporation consented to be sued in all the courts of the state, which term includes the U.S. Courts. The facts before the Supreme Court limited the waiver to such cases as by *express appointment* consent to be sued was given. The Supreme Court not having before it any other facts and therefore not having extended the doctrine further, and the earlier decisions of the court having held that the doing of business did not constitute a waiver, the rule of the earlier decision still stands in cases where there has been no appointment of an agent.

Another limitation upon the scope of the Neirbo rule is evident from the facts which appear more fully in the opinion of the Circuit Court of Appeals 103 F (2d) 765, 766 when the case was before that court. The facts as there stated indicate that the action was brought in a United States Court sitting in New York to enjoin the

sale of property located in New York. The Supreme Court therefore was not called upon to decide whether it would overrule its former decisions holding that consent given by a foreign corporation to be sued in a state other than that of its domicile constituted consent to be sued only upon causes of action arising in such state. Such rule therefore still stands as it is expressed in *Old Wayne Life Assn v. McDonough,* 204 U.S. 8, 22; 27 S.Ct. 236, 51 L.Ed. 345, wherein the court said:

> "Conceding then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that Commonwealth—'in this State.' While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business."

The claim for relief here is to enforce an alleged liability for royalties due under a contract not made in Idaho, and not to be performed in Idaho. The fact that part of the revenue from which plaintiff might expect payment of royalties, if due, was derived from Idaho sales does not change the place where the alleged contract was made, nor where it would be performed by payment. Payment, if due, would be in Texas or Michigan, not Idaho. Accordingly, the defendant, even if it were doing business in Idaho has not waived its right to object to the venue of an action brought in Idaho upon a claim upon an alleged contract not arising in and not to be performed in Idaho.

Even had the decision of the Supreme Court in the Neirbo case or otherwise gone so far as to hold that the doing of business in a state constituted an implied waiver of the privilege of objecting to improper venue,

UNDER THE FACTS OF THIS CASE DEFENDANT WAS NOT DOING BUSINESS IN IDAHO.

The first step in considering this proposition is to examine the facts. In examining the facts it will be found that except in a few matters the plaintiff and defendant were in agreement as to what the defendant did. They were not in agreement as to the effect of such actions. Where discrepancies or uncertainties exist the statement of facts hereinafter set forth, accepts as true the fact most favorable to the defendant. Had there been a trial on the merits, the rules would have been otherwise, because such evidence as would support the finding of the Court would be accepted as true. How-

ever, as above shown, the rule is different where, as here, a motion for summary judgment was granted based upon the pleadings and depositions, and without a trial.

The activities in Idaho in which defendant was engaged are as follows:

1. Its representatives solicited in Idaho for sales of merchandise to be shipped in interstate commerce from other states into Idaho after approval at defendant's principal office in Texas.

2. It shipped merchandise in interstate commerce into Idaho consigned to itself or to its customers, and before delivery and while still in the original freight cars it sometimes diverted such interstate shipments to its customers in Idaho other than the original consignee.

3. It collected accounts receivable due to it.

4. It permitted postponement of payment upon accounts receivable due to it from its customers until such time as the customers should sell such merchandise in the following season, under an arrangement whereby all insurance, storage and carrying charges were paid by the customer, and which it is contended by plaintiff should be construed as the sale of goods on consignment with title retained in defendant.

5. Defendant's President held a note secured by mortgage upon land in Idaho as security for a debt in which there was no evidence showing that defendant had any interest in the security, and concerning which the only evidence was that it held no such interest.

DEFENDANT WAS NOT DOING BUSINESS IN IDAHO AT THE TIME THE ALLEGED CLAIM AROSE OR AT THE TIME OF THE COMMENCEMENT OF THE ACTION.

The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments to be made from outside of Idaho, does not constitute doing business in Idaho into which the goods are shipped. The question of whether or not the defendant was doing business in Idaho is to be determined from the decisions of the highest court of that state under the rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78; 58 S.Ct. 817, 82 L.Ed. 1188.

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no Federal general common law."

The Supreme Court of Idaho has in two decisions held that the solicitation of orders by a foreign corporation with the orders to be shipped from outside of the state does not constitute doing business in the state. The first of these decisions is *Belle City, etc. Co. v. Frizzell,* 11 Ida. 1, 7; 81 Pac. 58, wherein the court said:

> "It is contended by counsel for appellant that although the respondent manufactured its machinery in the state of Wisconsin and simply took orders as above stated, for the sale of such machinery within the state of Idaho, that it comes within the pro-

visions of said act and cannot maintain this action. We cannot agree with counsel in that contention. The legislature never intended that that law should apply to foreign corporations except those actually engaged in business within the state, and excludes interstate commerce. And it was not intended to apply to interstate commerce between corporations or citizens of other states and citizens or corporations of this state. . . . . .

(p. 8) "So far as the transaction in the case at bar is concerned, it was simply and purely interstate commerce. The machine was manufactured in Wisconsin and shipped direct from the manufactory without the state as per said order to the appellant within the state of Idaho, or to M. J. Shields, to be delivered to the appellant. . . . . .

(p. 9) "If the legislature intended to apply the provisions of the law under consideration to facts such as those involved in the case at bar, it must be held unconstitutional as in violation of the commerce clause of the federal constitution. But we do not think the legislature intended to have it applied to transactions such as those involved in the case at bar; in other words, interstate commerce."

The next case is *Toledo Computing Scale Co. v. Young,* 16 Ida. 187, 191; 101 Pac. 257:

"Some question is raised in regard to the capacity of the plaintiff to transact business in this state until it has complied with the statutes regulating foreign corporations doing business within the state. There is nothing in this contention, for the reason

> that there is nothing in the record to show that it comes within the class of foreign corporations that must comply with the laws of this state in regard to filing its articles of incorporation, etc. The record shows that it is a foreign corporation engaged in interstate commerce. The order for the scale referred to in this action is dated at Rathdrum, Idaho, and addressed to the plaintiff at Toledo, Ohio, thus clearly indicating that it is engaged in interstate commerce, and not engaged in such business as would require it to comply with the laws of this state in regard to filing its articles of incorporation and appointing an agent upon whom service of process might be made."

The form of sales order used by defendant contains a statement that the order is subject to confirmation at its general office in Texas (p. 193). Accordingly, the act of acceptance took place in Texas. The Idaho decisions therefore indicate that solicitation of orders in Idaho, acceptance thereof in Texas, and filling of the orders by shipments from outside of Idaho does not constitute the doing of business in Idaho.

The Supreme Court has held to the same effect. In *Furst v. Brewster,* 282 U.S. 493, 496; 51 S.Ct. 295, 75, L.Ed. 478, the court said:

> "It appeared that Furst & Thomas did business at Freeport, Illinois, that they received at that place orders from the defendant, Brewster; and that the goods so ordered were shipped to Brewster at Warren, Arkansas, from the branch warehouse of Furst & Thomas at Memphis, Tennessee. ..... It

> was admitted that the corporation had not been authorized to do business under the laws of Arkansas (p. 497). These transactions were clearly interstate commerce. ..... The ordering and shipping of the goods constituted interstate commerce.''

The Idaho rule and the rule as announced by the highest United States Court are the same.

The facts in this case make the above decisions applicable and, accordingly, the solicitation and shipment of orders was interstate commerce and did not constitute doing business in Idaho.

The sending of so-called ''roller cars'' into Idaho, and diverting them after arrival in Idaho, was not the doing of business in Idaho. It is obvious that the interstate shipment is not completed until final delivery. No instance is given to show delivery and thus completion of the interstate shipment until delivery has been made to a customer. Delivery was never made to defendant. There is no claim that any of the cars were opened, and the diversion took place while they were still in transit as part of an interstate commerce transaction. In this case, the diversion of the ''rollers'' was in each instance made while still in the railroad cars as a part of an interstate commerce transaction. The diversion was an incidental act in such shipment, and was necessary to complete a sale.

The Supreme Court in *York Mfg. Co. v. Colley,* 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, held that the interstate commerce feature of a transaction is not lost because incidental acts necessary to complete the same are

performed within the state, and that a seller was not doing business in the state where as a part of an interstate sale it sent its engineer into the state to install a refrigeration plant. The syllabus states briefly the doctrine of case as follows:

> "In an interstate contract for sale of a complicated ice-making plant, it was stipulated that the parts should be shipped into the purchasers' State and the plant there assembled and tested under the supervision of an expert to be sent by the seller. The purchasers agreed to pay him a per diem while so engaged and to furnish mechanics for his assistance, and their obligation to accept the plant was made dependent on the test. The erection took three weeks and the test a week more. *Held,* that these provisions as to the services of the expert were germane to the transaction as an interstate contract and did not involve the doing of local business subjecting the seller to regulations of Texas concerning foreign corporations."

The same rule applies here where in order to complete a sale it becomes necessary to divert an existing interstate shipment to some other point in the state. This is a vastly different situation than one where the goods come to rest in the state and are stored in a warehouse or otherwise. The rules in such cases obviously would not apply here. Any argument on such proposition, however, will be reserved for rebuttal if cases of that character are cited in plaintiff's brief. Accordingly, the practice with respect to roller-cars does not constitute the doing of business in Idaho.

The collection of accounts is not the doing of business in the state. If defendant had been in the business of loaning money apart from the extending of credit upon merchandise, a different rule might apply which need not be discussed because not material here. There are numerous decisions which could be cited to the effect that collection of accounts is not the doing of business in a state, but only one such case will be cited because it is authoritative and should be sufficient. In *Furst v. Brewster,* 282 U.S. 493, 498, 51 S.Ct. 295, 75 L.Ed. 478 the Supreme Court said:

> "Any state statute which obstructs or lays a direct burden on the exercise of the privilege is void under the commerce clause. .....
>
> "Accordingly, when a corporation goes into a state other than that of its origin to collect according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause obstruct the attainment of that purpose. .....
>
> (p. 499) "We are of the opinion that the provisions of the statute of Arkansas (requiring a foreign corporation to qualify), as applied in this case, are in conflict with the commerce clause."

In the instant case the occasions when accounts were collected by defendant's representatives in the state were few; there was no authorization shown in the representatives who came into Idaho to adjust or to make compromise settlement of accounts, and all that such representatives did was to receive checks, if they could get

them, which were not cashed by them but which were forwarded to defendant's principal office in Texas. Accordingly, the above rule applies and the collection of the accounts did not constitute the doing of business.

The retention of title to merchandise held on consignment is not the doing of business in the state. Under the evidence there is considerable doubt as to whether defendant retained title to any merchandise. The sales to its customers in the first place were outright sales, not conditional sales, nor sales on consignment. The customer was charged with the purchase price, and took the credit risk on resale. The merchandise was of a seasonal character, and if not sold during the fruit packing season, would not be sold until the season in the following year. In such case the customer received an extension of credit, and was not required to pay such portion of his account as was represented by such carry-over merchandise until the following season. The customer paid the insurance, storage and carrying charges, no instrument of conveyance or of mortgage was executed, and no agreement covering the situation could be found. If the price of the merchandise went up or down between seasons there was no evidence to indicate that the accounting would be made on the new basis. How settlement would be made in the event of a fire loss was not known, because no fire loss had ever occurred. It is doubtful if defendant had any title whatever in the merchandise. Certainly it would have had no title as against any creditors of the customer if the customer had become insolvent. The charge to the customer remained upon the defendant's books and the defendant attempted to exercise no acts of dominion over the mer-

chandise. It is, accordingly, doubtful if the title to the merchandise was in any person other than the customer. These circumstances do not contain the elements of a consignment nor of a title retention contract, but even if title were retained in defendant, and even if there were such a consignment contract, such retention of title to such merchandise held on consignment does not constitute the doing of business in the state. The leading case on this proposition is *Butler Bros. Shoe Co. v. U. S. Rubber Co.,* 156 Fed. 1, 19, (certiorari denied, 212 U. S. 577). This case is cited frequently and with approval in a great number of other cases. The Circuit Court of Appeals for the 8th Circuit in that case said:

> "Let us now turn to the contracts, observe what the rubber company agreed to do and what it actually did under them, and determine, if possible, whether or not in making or in performing these agreements its was guilty of doing any business within the meaning of the Constitution and statutes of Colorado. It agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it

agreed to bear all the expenses and losses of receiving, storing, and selling the goods; and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. The goods were billed to them in the name of the shoe company as consignee. The profits of the business and the work of the business, the labor of receiving, storing, and selling the goods, were the shoe company's. The profits constituted its factorage, its compensation, for carrying on the business. There is no question here between the state and the shoe company, or between the shoe company and the purchasers of the goods, or between the rubber company and the purchasers of the goods. The question here is between the consignor and the factor, and it is whether the consignor, which did not agree to do, and did not in fact, do the business of receiving, storing, and selling these goods, or the factor who did contract to do, and did actually do, the business of receiving, storing, and selling these goods, in Colorado, and who received the factorage therefor, was doing that business. In a simple transaction the true answer seems clear. A farmer sends to a commission merchant in a city a dozen barrels of apples for him to sell. The factor puts them in this store, sells them, received the proceeds, and remits them, less his factorage. The farmer from time to time sends 1,000 barrels during the season, and they are sold and the proceeds are remitted in the same way. The farmer is not carrying on the business of selling

apples in the city, but the factor is. The transaction in hand is larger, but in every element which conditions its legal character and effect it is not different. The transaction between the parties to this suit was interstate commerce. The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the good in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that state, and the contracts between these litigants are valid and enforceable."

Among the cases where this decision was cited with approval was *Furst v. Brewster,* 282 U.S. 493, 51 S. Ct. 295, 75 L.Ed. 478, already cited above. At any rate, this decision remains the law and its doctrine has not been overruled, but is well established and settled.

There is some evidence that insurance on this allegedly consigned merchandise was carried in the name of defendant as well as of the customer. This would not alter the rule. In *Three States Buggy Co. v. Kentucky,* 32 Ky. L. 385, 386, 105 S.W. 971, the court said:

"We construe this contract as not appointing Walker & Brent as agents of the appellant, but as providing for a series of sales to them upon the credits and terms stipulated in the writing. It will be observed that Walker & Brent do not take any goods they do not want. They buy them at the

wholesale prices fixed by appellant, if agreed to by the local firm. They take them at Cairo, on board of cars, at their risk, and ship them to Bardwell at their expense. There they place them in their own store, sell them on such terms and at such prices as they can. The proceeds of the sale belong to Walker & Brent. If the goods should be lost or destroyed in transit or at Bardwell, or if the sales were made upon uncollectible credits, the whole of the loss would fall upon Walker & Brent. The unusual features of the transaction from which it is argued that the contract constitutes an agency are the stipulations as to credits, the agreement of appellant to take back the unsold goods, and the clause relating to insurance. But these features pertain alone to the time and manner of payment for the goods sold to Walker & Brent. The agreement to take back unsold goods is a provision, in effect, for their resale by Walker & Brent to appellant; but even then Walker & Brent must be at the risk and cost of delivering the goods at Cairo, Ill., in as good condition as they were received by them. The insurance clause is not inconsistent with either construction, but we think it is in the nature of surety as used in this instance. An agency such as the commonwealth contends existed under this contract would leave the title of the goods in appellant, with the right in it to recall them or withdraw them at any time, and to control their retail prices and terms of sales to consumers. This right it has not under the contract. Nor would the goods of Walker & Brent under this contract be subject to

levy and sale for the debt of appellant. An action of replevin, detinue, or trover concerning them would have to be brought in the name of Walker & Brent, not appellant.

"We conclude that appellant was not in this transaction carrying on business in this state within the contemplation of Section 571, Ky. St. 1903."

To the same effect is *Cooper Rubber Co. v. Johnson,* 133 Tenn. 562, 564; 182 S.W. 593:

"The first and main defense of the sureties is that the complainant rubber company had not complied with our foreign corporation acts, and was doing business in this State through the agency of the tire company; therefore that it may not maintain the suit because of the failure to so comply. This defense was sustained by the chancellor.

"The contract between the two companies is in character one of consignment of merchandise for sale, unless one or more of its provisions later to be set out, relied on by appellee as so doing, mark it as one governing the parties as principal and agent—the tire company as agent through which the rubber company did business in this State. .....

(p. 567) "While in one sense a factor or commission merchant is the agent of the consigning dealer or manufacturer, he does not conduct an agency or business for the latter at the place of business of the former, where the sales of the consigned merchandise are made to customers chosen by the local dealer, at his own risk, and the proceeds of the sale do not be-

come the exclusive property of the consigning company. A business so conducted is truly said to be that of the factor or commission merchant. .....

(p. 568) "The power to insure the goods placed in his hands is one of the ordinary powers of a factor or of one selling on commission, imposable by contract or usage on the factor as such. 1 Mechem on Agency (2d Ed.), sec. 2521; 12 Am. & Eng. Enc. L. (2d Ed.), 656; *Wasey v. Whitcomb,* supra. Manifestly the provision had relation to and was in furtherance of the duty to care for, and in certain circumstances to return, the goods. The cost of the insurance was to be paid by the local dealer, not by the rubber company through it. .....

(p. 570) "We are of the opinion that the several defenses urged by the appellee are not maintainable, and that the chancellor erred in not decreeing in favor of the rubber company."

Even if the facts in this case showed the retention of title by defendant to goods held on consignment in Idaho, such fact would still not constitute the doing of business in Idaho.

The facts relative to the land held as security do not constitute the doing of business in Idaho. The merchandise for which the debt was contracted was shipped not by defendant but by the Basket Sales Company. The debt thus incurred was later secured by a mortgage upon Idaho real estate given not to defendant but to defendant's President as an individual. No entry was made on defendant's books, and defendant had no interest in the security. The mortgagor executed a document which in

effect constituted an assignment for the benefit of his creditors, or more properly, the giving of security upon his equity to a Trustee for the purpose of securing his creditors. The Trustee was the father of defendant's salesmanager but never was employed by, and never was a representative of defendant. Even if defendant were interested in the property and operated the orchard property, it would not constitute the doing of business. The general rule is found in *Sillin v. Hessig Ellis Co.*, 181 Ark. 386, 390; 26 S.W. (2d) 122, wherein the court said:

> "These authorities also sustain the principle of law that a foreign corporation has a right to take a mortgage and to foreclose it for the purpose of collecting its account resulting from interstate commerce without complying with the laws of the state regulating the admission of foreign corporations for the purpose of doing business within the state. The underlying principle is that if the indebtedness was incurred in transactions growing out of interstate commerce, the foreign corporation could come into the state and collect its debts, and that such act would not amount to doing business in the state. . . . .
>
> (p. 391) "Again, the record shows that appellee purchased at two different places in the state of Arkansas a stock of drugs for the purpose of collecting its debt against a retail drug store. In each instance, it only operated the drug store until it could dispose of the stock of drugs and thereby collect its debt. This, as we have already seen, was a mere incident to the collection of the debt and

did not constitute doing business within the state. In each of the instances cited above the buying in of the stock of drugs by appellee was for the purpose of collecting an account resulting from an interstate transaction, and the practice complained of did not involve doing business in the state which would subject appellee to the regulation of the state concerning foreign corporations. This court has expressly held that our statute prohibiting foreign corporations from doing business in this state without complying with its terms does not prohibit such corporations from taking a note or mortgage to secure a past-due indebtedness for goods sold in interstate commerce."

The property consisted of an orchard upon which fruit was grown. The record does not state that baskets manufactured by defendant were used in the marketing of the crop but assuming such to be the case the extension of credit for merchandise purchased in interstate transactions, is not the doing of business in the state. In *Yarborough v. Gage,* 254 Mo. 1145, 70 S.W. (2d) 1055 wherein the syllabus correctly expresses the doctrine of the case in the following language:

"Where Tennessee cotton factor advanced money to Missouri cotton dealer under trust deed and cotton contract, credit being extended in consideration of agreement to ship cotton to Tennessee to be handled by factor, transaction constituted 'interstate commerce,' and hence notes and trust deed were valid and enforceable in Missouri notwithstanding factor had not complied with statute pre

scribing conditions under which foreign corporation may do business in state."

There is no theory under which the facts relative to the taking of security upon the land constituted the doing of business in Idaho.

As above shown, the solicitation of orders to be filled by shipment from outside the state, is not doing business in the state, and this rule is applicable even though some of the shipments are diverted in transit; the collection of accounts for merchandise theretofore shipped in interstate commerce is not the doing of business; the facts in this case do not show that title to any merchandise was retained by defendant, but even if so, it merely constituted merchandise shipped on consignment and does not constitute doing of business; nor do the facts relative to the Idaho land establish any onership or interest in the land, and they do not constitute the doing of business in Idaho.

Since the defendant was not doing business in Idaho it did not waive its privilege of objecting to the venue of the action in Idaho, and since the District of Idaho was the residence of neither the plaintiff nor the defendant, the motion to dismiss on the ground of improper venue should have been granted.

SERVICE WAS NOT PROPERLY MADE UPON DEFENDANT.

The Idaho Code, 5-507, states:

"The summons must be served by delivering a copy thereof as follows. . . . .

"2. If the suit is against a foreign corporation

> ..... doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier or secretary, or to ..... any other agent of said corporation."

The provision for service of summons applies only to a foreign corporation which is "doing business". The "doing business" is an essential element before any of such persons becomes a proper person upon whom to make service of summons. Accordingly, regardless of whether or not the salesmanager would have been a proper person had the defendant been doing business in Idaho, service was improperly made upon him because there was no authority for serving any person unless the defendant were doing business. As above shown, the defendant was not doing business in Idaho, and service upon any person would would have been improper and, accordingly, the motion to quash the service of summons should have been granted.

SUMMARY

I. Where there is a discrepancy or uncertainty in the facts, the position most favorable to the party against whom a summary judgment is sought to be entered must be accepted as true.

   A. *McElwain v. Wickwire Spencer Steel Co.,* 126 F (2d) 210, 211.

II. The doing of business in a state without qualifying as a foreign corporation does not constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in such state.

A. The rule of *Neirbo v. Bethlehem Shipbuilding Corporation,* 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 applies under the facts of that case only to situations where

1. Claim for relief arises or is to be performed in the state, and
2. There is an express waiver by qualifying and designating an agent.

B. But where these situations do not exist, the right to object to improper venue is not waived.

1. *In re Keasbey and Mattison Co.,* 160 U.S. 221, 231; 16 S.Ct. 273, 40 L.Ed. 402.
2. *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27, S.Ct. 236, 51 L.Ed. 345.

III. Defendant was not doing business in Idaho at the time the alleged claim arose or at the time of the commencement of the action.

A. The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments to be made from outside of Idaho, does not constitute doing business in Idaho into which the goods are shipped.

1. The law of Idaho is controlling
   a. *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 78; 58 S.Ct. 817, 82 L.Ed. 1188.
2. The decisions of Idaho support this proposition.
   a. *Belle City, etc., Co. v. Frizzell,* 11 Ida. 1, 7; 81 Pac. 58.

b. *Toledo Computing Scale Co. v. Young,* 16 Ida. 187, 191; 101 Pac. 257.

3. *Furst v. Brewster,* 282 U.S. 493, 496; 51 S.Ct. 295, 75 L.Ed. 478.

B. The sending of so-called "roller" cars into Idaho and diverting them after arrival in Idaho was not the doing of business in Idaho.

1. The interstate character of a transaction is not lost, because incidental acts necessary to complete the sale are performed in the state.

1. *York Mfg. Co. v. Colley,* 247 U.S. 21, 38 S. Ct. 430, 62 L.Ed. 963.

C. The collection of accounts is not the doing of business in the state.

1. *Furst v. Brewster,* 282 U.S. 493, 498; 51 S. Ct. 295, 75 L.Ed. 478.

D. The retention of title to merchandise held on consignment is not the doing of business in the state.

1. *Butler Bros. Shoe Co. v. U. S. Rubber Co.,* 156 Fed. 1 (certiorai denied 212 U.S. 577).

a. Which case was approved in *Furst v. Brewster,* 282 U.S. 493, 498; 51 S.Ct. 295, 75 L.Ed. 478.

2. Even where insurance is carried for benefit of consignor.

a. *Three States Buggy Co. v. Kentucky,* 32 Ky.L. 385, 386; 105 S.W. 971.

b. *Cooper Rubber Co. v. Johnson,* 133 Tenn. 562, 564; 182 S.W. 593.

E. The facts relative to the land held as security does not constitute the doing of business in Idaho.

1. Even if defendant were interested in property as means to collect a debt.

a. *Sillin v. Hessig-Ellis Co.,* 181 Ark. 386, 390; 26 S.W. (2d) 122.

2. Even if security were given as part of arrangement for extension of credit.

a. *Yarborough v. Gage,* 254 Mo. 1145, 70 S.W. (2d) 1055.

IV. The sales manager of defendant, although served in Idaho was not a proper person upon whom to serve process.

A. Statute permits service only if foreign corporation is doing business in state.

1. Idaho Code Title 5, sec. 507.

B. As above shown defendant was not doing business.

CONCLUSION

It has been shown that even if the defendant were doing business in Idaho nevertheless the District of Idaho is not the proper district for the commencement of the action, and the doing of business by defendant does not constitute a waiver of its right to object to improper venue.

It has been further shown that under the facts of this case, defendant was not doing business in Idaho. It has been further shown that service was not properly made upon the defendant. The privilege of objecting to improper venue not having been waived; the objection seasonably made and raised at every stage of the proceedings was good; the motion to dismiss should have been granted on the ground that the District of Idaho was not the proper place for bringing the action, and on the ground that service was improperly made upon defendant. The motion for summary judgment for like reason should have been overruled, and it was error to enter the final judgment.

The judgment should be reversed and the cause remanded to the trial court with instructions to vacate the judgment, deny the motion for summary judgment, and grant the motion to dismiss.

Respectfully submitted:

GEORGE DONART,
Weiser, Idaho.

FREDERICK P. CRANSTON,
409 Equitable Bldg.,
Denver, Colo.

Attorneys for Appellant.

Appellant's Address:
Paris, Texas.

No. 10279

United States
Circuit Court of Appeals
For the Ninth Circuit

CUMMER-GRAHAM COMPANY, a Corporation, *Appellant,*

vs.

STRAIGHT SIDE BASKET CORPORATION, a Corporation, *Appellee.*

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

HONORABLE CHARLES C. CAVANAH, *Judge*

RICHARDS & HAGA
OLIVER O. HAGA,
J. L. EBERLE,
Of Boise, Idaho,
Attorneys for Appellee.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 157403

United States
Circuit Court of Appeals
For the Ninth Circuit

CUMMER-GRAHAM COMPANY, a Corporation, *Appellant,*

vs.

STRAIGHT SIDE BASKET CORPORATION, a Corporation, *Appellee.*

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

---

HONORABLE CHARLES C. CAVANAH, *Judge*

RICHARDS & HAGA
OLIVER O. HAGA,
J. L. EBERLE,
Of Boise, Idaho,
Attorneys for Appellee.

SUBJECT INDEX

TABLE OF CASES

ENCYCLOPEDIAS

ANNOTATIONS

FEDERAL RULES OF CIVIL PROCEDURE

STATUTES

United States
Circuit Court of Appeals
For the Ninth Circuit

CUMMER-GRAHAM COMPANY, a Corporation, *Appellant,*

vs.

STRAIGHT SIDE BASKET CORPORATION, a Corporation, *Appellee.*

APPELLEE'S BRIEF

STATEMENT OF THE CASE

This action was commenced by appellee, hereinafter sometimes referred to as plaintiff, against appellant, hereinafter sometimes referred to as defendant, to recover a money judgment for royalties due plaintiff under a license contract for the manufacture of baskets, for handling, storing, and shipping vegetables and fruit, under patents held by plaintiff. Upwards of 200 carloads of such baskets of the value of about $200,000.00 (R. 179), are marketed annually in Idaho by defendant.

Plaintiff is a Michigan corporation and defendant a Texas corporation. The case presents two legal questions:

(a) Was defendant legally served with process in Idaho?

(b) Has defendant, by its activities in the State of Idaho, waived its right to object to the venue of the action?

The answer to both questions involves the nature and extent of defendant's activities in the state. Defendant refused to answer to the merits after its motion to quash the service and to dismiss the action had been overruled. The so-called answer (R. 33-36) to the amended complaint presented only the identical legal questions that the Court had previously decided against defendant on its motions to quash and dismiss. In the last paragraph of defendant's answer (R. 36) it said: *"Defendant refuses to answer any allegations of the amended complaint concerning the merits of the action and declines in any manner to plead to the merits."*

The motions had been presented on: (a) depositions taken by plaintiff at which defendant appeared and cross examined the witnesses, most of whom were defendant's officers and representatives, and (b) upon affidavits covering facts not covered by the depositions and the exhibits introduced in connection with the depositions.

Some of the exhibits have not been printed in full in the record (see defendant's designations of portions of record to be printed, R. 225-227). When defendant's designation was received by counsel for plaintiff, the exhibits had been sent to the Clerk of this Court and were not available for examination in Boise. Plaintiff, therefore, could not determine what additional portion of the exhibits should be printed. Plaintiff's designation (R. 227-229) calls attention to certain exhibits that should be printed and plaintiff reserved the

right to refer in its brief and on the oral argument to anything contained in the exhibits, material to its appeal, "even though not included in the printed record and to have such parts printed if required by the Court, in a supplemental record, at appellant's expense."

Summary Judgment: In view of the fact that defendant refused to plead to the merits and only presented in its answer the identical legal questions on which the Trial Court had ruled against defendant, there were no facts for determination by the Trial Court on the trial of the action, and plaintiff accordingly filed a motion for a summary judgment under Rule 56 (R. 37). The hearing on the motion was continued to September 1, 1942 (R. 41), at which time the summary judgment was entered (R. 42), defendant's counsel being present.

Attachment: An attachment was issued at the time of the commencement of the action and levy was made on 8,108 baskets of an aggregate value of $1,279.48, owned by defendant but in the possession of one of the distributors, and upwards of $8,000.00 due defendant from that distributor was garnisheed. The baskets and money were in *custodia legis* during all proceedings in the District Court.

Service on Responsible Agent: Service was made on C. H. Kinney, General Sales Agent for Appellant in a territory covering 26 states (R. 46). He was president of Veneer Products Company (R. 48), one of appellant's large subsidiaries or affiliated companies. He had charge of the marketing of substantially all of

appellant's baskets; and the marketing of baskets was appellant's principal business. Mr. Kinney held a responsible position and reported promptly the service of the papers to the proper parties.

Doing Business in Idaho: The selling of baskets in Idaho was an important part of appellant's business. C. H. Kinney spent annually about 60 days in Idaho selling and promoting the sale of the baskets (R. 52). At times he was assisted by the president and vice presidents of the company (R. 15, 164), and by his brother, A. V. Kinney. Mr. Kinney made collections and adjustments for appellant and generally handled its business in Idaho while in the State (R. 174-179). During the packing season appellant would send to Idaho what it calls "rollers" or "roller cars," loaded with baskets and consigned to itself, usually at Nampa, Idaho, and its salesmen would sell to Idaho customers these "rollers" while held at the Nampa yards and thus make quick delivery. Such cars were not sold until *after* they had been shipped from Texas, usually after they reached Idaho, and hence were not shipped or sold in interstate commerce, but appellant's business was substantially the same as if the baskets had been stored in a warehouse at Nampa and sold from there to growers and dealers in Idaho.

The Idaho dealers or so-called distributors were selling on *commission,* and if any of the "rollers" were not sold during the season, they were stored in Idaho for appellant until the following year and then sold at the price fixed by appellant (R. 124-141). The record shows a very substantial intra-state business, and that was the conclusion of the District Court.

BRIEF OF THE ARGUMENT

A.

Defendant Was Legally Served with Process in Idaho and the Court Did Not Err in Overruling the Motion to Quash the Summons and Service.

1. The activities of a foreign corporation which are sufficient to make it amenable to process within a state by service upon an officer or agent of the corporation may be less than those required to subject the corporation to the provisions of the state's licensing and taxation statutes.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

Liquid Veneer Corp. vs. Smuckler, 9 Cir., 90 F. (2d) 196.

Denver & R.G. R. Co. vs. Roller, 9 Cir., 100 F. 738.

Bendix Home Appliances vs. Radio Accessories Co., 8 Cir., 129 F. (2d) 177.

2. A corporation is engaged in transacting business in a state if, in fact, in the ordinary and usual sense it transacts business therein of any substantial character.

Brown vs. Canadian Pac. Ry. Co., 25 F. Sup. 566.

Vilter Mfg. Co. vs. Rolaff, 8 Cir., 110 F. (2d) 491.

Tauza vs. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, and cases cited under parag. 1.

3. A corporation is *present* in any state where its officers or agents transact business in its behalf by

authority of the corporation, and, when it appears that the corporation is engaged in transacting its corporate business in such a way as to manifest its presence within the state, process may be served on the officer or agent in charge of such business.

Steele vs. Western Union Telegraph Co., 206 N. Car. 220, 173 S.E. 583, 96 A.L.R. 361.

Reeves vs. So. Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513.

State ex rel Taylor Laundry Co. vs. District Court, 102 Mont. 274, 57 Pac. (2d) 772, 113 A.L.R. 1, and cases cited under paragraphs 1 and 2.

4. A "managing or business agent," or "general agent," within the meaning of the Idaho statutes (Sec. 5-507, I.C.A.) or Rule 4(d)(3) of the Federal Rules of Civil Procedure, is any agent or officer whose position, rank, and duties make it reasonably certain that the corporation will be apprised of service made upon him.

Mas vs. Orange Crush Co., 4 Cir., 99 F. (2d) 675.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

Bauer vs. Union Central L. Ins. Co., 22 N.D. 435, 133 N.W. 988.

Sanzone-Palmisano Co. vs. So. R. Co., 23 Ohio L. Rep. 162.

Halpern vs. Pa. Lbr. Industries, 244 N.Y.S. 372.

Beach vs. Kerr Turbine Co., 243 F. 706.

Nickerson vs. Warren City Tank & Boiler Co., 223 F. 843.

Johnson vs. Pac. Steel Boiler Corp., 230 N.Y.S., 441.

Jackson vs. Schuylkill Silk Mills, 156 N.Y.S. 219.

Swift vs. Matthews Engineering Co., 165 N.Y. S. 136.

Michigan Aluminum Foundry Co. vs. Aluminum Castings Co., 190 Fed. 879.

Toledo Computing Scale Co. vs. Computing Scale Co. (C.C.A. 6), 142 F. 919.

Harbich vs. Hamilton-Brown Shoe Co., 1 F. Supp. 63.

Clements vs. McFadden Publications, 28 F. Sup. 274.

Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills, 278 F. 816.

5. It is not material that the officers of a corporation *deny that the agent was expressly given such power, or assert that it was withheld from him.* The question turns upon whether the agent is the corporation's representative in the state and whether his position is such that the law will imply that he will inform his superiors of the service made upon him; and, if he is that kind of agent, the service is valid, notwithstanding a denial of authority on the part of the other officers of the corporation.

Conn. Mutual Life Ins. Co. vs. Spratley, 172 U.S. 602, 43 L. Ed. 569.

Rendleman vs. Niagara Sprayer Co., 16 F. (2d) 122.

6. If a corporation is doing acts of business in a state sufficient to show an intent to make it an effective part of its field of operation in the business for which it was created, it is *present* in the state and it may be sued and served with process within the state.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

7. It has long been settled by both state and federal courts that the fact that the business carried on by a corporation in a state is wholly *interstate* in character, does not render the corporation immune from the ordinary process of the courts within the state.

Can. Pac. Ry. Co. vs. Sullivan, 1 Cir., 126 F. (2d) 433.

International Harvester Co. vs. Kentucky, 234 U.S. 579, 58 L. Ed. 1479.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

8. A foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found and service obtained on an agent or officer.

Steele vs. Western Union Telegraph Co., 206 N.C. 220, 173 S.E. 583, 96 A.L.R. 361.

Reeves vs. So. Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513.

Deatrick vs. State Life Ins. Co., 107 Va. 602, 59 S.E. 489.

Erving vs. C. & N.W. Ry. Co., 171 Minn. 87, 214 N.W. 12.

Lipe vs. Carolina C. & O. Ry. Co., 123 S.C. 515, 116 S.E. 101, 30 A.L.R. 248.

Vilter Mfg. Co. vs. Rolaff, 8 Cir., 110 F. (2d) 491.

C.J. 14-A, page 1383.

Annotations in 30 A.L.R. 255 and 96 A.L.R. 366.

9. There is no inhibition in the laws of Idaho against a non-resident suing a foreign corporation in the State of Idaho on a cause of action originating in another state. Such actions and attachments therein have been sustained by the Supreme Court of the State.

Jennings vs. Idaho Ry. L. & P. Co., 26 Ida. 703, 146 Pac. 101.

B.

The Defendant, by Its Activities in the State of Idaho, Has Waived Its Right to Object to the Venue of the Action.

10. Section 51 of the Judicial Code, Sec. 112, Title 28 U.S.C.A., accords to a defendant a personal privilege respecting the venue, or place of suit, which the defendant may assert or may waive at his election. The waiver may be by conduct instead of positive consent.

Neirbo Co. vs. Bethlehem Ship Building Corp., 308 U.S. 165, 84 L. Ed. 167, 128 A.L.R. 1437.

Okla. Packing Co. vs. Okla. Gas and Elec. Co., 309 U.S. 4, 84 L. Ed. 537.

Schwartz vs. Aircraft Silk Hosiery, 2 Cir., 110 F. (2d) 465, 31 F. Sup. 481.

Ward vs. Studebaker Sales Corp., 2 Cir., 113 F. (2d) 567.

11. To hold that a foreign corporation that has qualified under the laws of a state and subjected itself to the payment of license fees and taxes therein has waived its right to object to being sued in that state, and to hold that a foreign corporation doing business in defiance of the state's laws has not waived such rights, would amount to penalizing the law-abiding foreign corporation and placing a premium upon outlawry.

Lipe vs. Carolina C. & O. Ry. Co., 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248.

A R G U M E N T

Counsel for appellant state in their brief (p. 5) that the primary issues are whether the District Court correctly decided the question of venue and whether service was properly made upon defendant's sales manager. With that statement we agree. However, defendant's brief seems to question the propriety of the summary judgment. We shall first dispose of that point.

Defendant's motion to dismiss was made on November 17, 1941 (R. 6-7). It was supported by the affidavit of C. H. Kinney, the general sales manager

of defendant (R. 8-9). There was an answering affifavit filed on behalf of plaintiff (R. 10-14) and a further affidavit filed by Mr. Kinney on behalf of defendant (R. 14-18).

The motion to dismiss based on the three affidavits referred to came on for hearing on February 2, 1942. The minutes of the Court show (R. 18-19) that it was agreed that plaintiff should amend its complaint to include the matters set forth in the affidavit of Mr. Haga filed in its behalf "and that thereupon the defendant would withdraw the affidavit of C. H. Kinney filed on this date," all of which was approved by the Court, and it was ordered that the hearing be continued until after depositions had been taken on defendant's activities in the State of Idaho. Pursuant to the order and the agreement between counsel, an amended complaint was filed (R. 20-24) and depositions were taken in Paris, Texas, by *plaintiff* of C. H. Kinney, A. V. Kinney, and A. C. Mackin, officers and representatives of defendant. These witnesses appeared to testify with great reluctance as to any matter that would support plaintiff's case. They were cross examined by defendant's counsel, who, by very leading questions to friendly witnesses, placed the answers in their mouths. Their depositions are set out in the record (R. 44-99). Thereafter plaintiff took depositions in Idaho of Frederick C. Hogue, one of defendant's principal distributors and agents in Idaho; F. H. Hogue, who had for a long period handled defendant's baskets in Idaho, and being also a large grower; Scott Brubaker, employee of F. H. Hogue; J. C. Palumbo, a

packer and buyer of baskets from defendant, and of R. H. DeHaven, a general representative of plaintiff. The depositions taken in Idaho are set out in the record (R. 100-183).

After the depositions had been taken an affidavit was filed on behalf of plaintiff (R. 25-26) to connect certain facts touched on in the depositions. Thereupon the motions to quash and dismiss were again submitted. The Court rendered its opinion on April 15 (R. 26-32). A further hearing on defendant's motion to dismiss was set for May 7, 1942, and that motion was denied on that date (R. 33).

Under the rules of the Court, the motions to dismiss and to quash having been denied, defendant was required to answer within 10 days, and it filed its answer on May 16 (R. 33-36), raising again the identical questions that had been ruled upon by the Court and decided against defendant. Defendant expressly stated that it refused to answer to the merits (R. 36), and plaintiff thereupon filed a motion for a summary judgment under Rule 56, and that was obviously the procedure when defendant had refused to put any facts in issue.

We think no valid objection can be made either to the amendments to the complaint, which were made with defendant's consent, or to the summary judgment in view of the status of the case at the time it was entered.

The appeal, therefore, in our opinion, presents only the validity of the service of process and whether defendant has waived its right to object to the venue of the action.

Service was made by the United States Marshal on the defendant personally at Payette, Idaho, on October 30, 1941, by serving the necessary papers on C. H. Kinney (R. 6), who was at the time in Idaho on defendant's business and then was, and for a long time prior thereto had been, defendant's general sales manager for 26 states (R. 46).

Whether defendant was subject to service of process in Idaho and whether it waived its right to object to the suit against it in that state must be determined on the proof as to the activities of defendant in the state. Under all the authorities, a foreign corporation may be *present* in a state so that it may be legally served with process, without also doing business therein to the extent and of the kind that would make it necessary for it to qualify under the foreign corporation laws of the state and subject it to the payment of qualifying and license fees, and to taxation in the state, or to penalties for doing business without having first qualified as required by the state law.

In this case it seems impracticable to first consider the facts that are sufficient to validate the service and then the facts which the District Court held constituted a waiver of the right to object to the venue. We shall save time and avoid repetition by considering together the facts on both propositions. As nearly all of the witnesses were officers or representatives of defendant, it may be assumed that their testimony, where favorable to plaintiff, need not be discounted. We shall review briefly the testimony of the several witnesses:

REVIEW OF EVIDENCE

C. H. KINNEY, Sales Manager for defendant, resides at Paris, Texas, where defendant has its headquarters. He has been sales manager since November, 1938 (R. 45). He was in Idaho at the time he was served with process on business for defendant. His territory as sales manager covers twenty-six states. He describes his duties as follows, stated in narrative form (R. 45-78):

> "Traveling about twenty-six states, supervising sales, dealers—that is, wholesalers, and assisting in sales work, taking orders, looking after collections—anything that comes up in the handling and selling of merchandise * * * Cummer-Graham Company does an extensive business in Idaho. As Sales Manager I have charge of sales made in the State of Idaho, supervising them (R. 46). * * * At the time I was served with the summons in this case I was the only one in the State of Idaho connected with Cummer-Graham Company. Prior to October 30, 1941, A. V. Kinney, a salesman; J. A. McGill (president), J. C. DeShong (Vice-President and director), and Wallace Norton (a Vice-President and director), also represented defendant in Idaho at different times (R. 56, 47, 15, 164).
>
> "Veneer Products Company is a corporation. Its records are kept at the office of Cummer-Graham Company in Paris, Texas. I am president of Veneer Products Company. It does not directly sell any merchandise in the State of

Idaho. It sells all its products to Cummer-Graham Company. It keeps separate records in the Cummer-Graham Company's office (R. 48). I would estimate the number of carloads shipped by Cummer-Graham Company to Idaho from June, 1940, to June, 1941, at close to 200 cars (R. 49). In numerous instances Cummer-Graham is the consignor and also the consignee in bills of lading covering shipments to Idaho—it is necessary under what we call the 'roller system.' The diversion point is generally Nampa, Idaho. From time to time as those cars reach Nampa, Idaho, they are diverted to other parties or concerns in Idaho. I have authority to divert those cars for Cummer-Graham Company (R. 50-51). When diversions are made at a time when I am in Idaho I have authority to give the instructions for diversions. I sometimes spend more time (in Idaho) than others. Generally a week or ten days at a time and back two or three times in a season. I spend approximately a maximum of two months per year in Idaho."

"Q. Then while you are in Idaho, Mr. Kinney, state specifically just what you do for Cummer-Graham while you are out there.

"A. Oh, my! There are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in—everything connected with sales work, I would say.

"I call on lots of growers or owners of orchards (R. 52). I solicit business for the jobbers or independent dealers in Idaho—anything that will help promote sales (R. 53-54).

"Q. Now, while you are in Idaho, Mr. Kinney, do you make any collections from these jobbers or independent dealers?

"A. Well, there happen to be a class that if you don't make the collections you push them up to send the money in, because if you could, you would make the collection (R. 54)."

When asked with reference to the contract between Cummer-Graham Company and Reilly Atkinson Company, one of the defendants' distributors in Idaho, he testified (R. 65-67):

"Q. And do you have what you call a so-called consignment contract with the Reilly Atkinson Company?

"A. We handle it as such, I would say.

"Q. Do you have any kind of a written agreement with Reilly Atkinson Company?

"A. Well, we have one. I don't know how old it is but we have just carried it forward and extended it from year to year.

"Q. And would you, Mr. Kinney, for the purpose of this record, supply the stenographer with a copy of any agreement which Cummer-Graham Company might have with Reilly Atkinson Company?

"A. I couldn't so promise. I don't even know if I could find it.

"Q. If you could find the agreement with the Reilly Atkinson Company, would you furnish the stenographer, for the purpose of this record, and as Exhibit A to your testimony, a copy of said agreement?

"A. Yes."

(The agreement was not furnished.)

"Q. Now, on the other hand, do you make an effort to sell any of these products while you are there in Idaho?

"A. I make an effort to sell all our products. That is part of my job."

A. V. KINNEY (R. 79-83): He resides at Pittsburg, Texas. From November, 1938, until December 31, 1940, he was salesman for Cummer-Graham Company. As such he did work in the State of Idaho—"general sales work in connection with our dealers in Idaho and sales promotion work for promotion of Cummer-Graham products" (R. 79).

"I called on all shippers and anyone who might possibly use any of the products manufactured by Cummer-Graham. During that time I had an office in Idaho. It was in the Reilly Atkinson warehouse in Payette. I was there not over three months in any one year. Part of the business was transacted from that office" (R. 80).

A. C. MACKIN (R. 83-96): He is and has been since

1931 Secretary and Treasurer of the Cummer-Graham Company.

> "It depends upon the territory whether C. H. Kinney makes collections. We frequently direct him to do so. We have told him to contact our dealers in Idaho at various times and have them send us in some remittances" (R. 83-84).

Witness is also Secretary-Treasurer of Veneer Products Company (R. 90), of which C. H. Kinney is President (R. 48).

> "When the summons was served on C. H. Kinney on October 30, 1941, at Payette he was representing Cummer-Graham Company in his official capacity as Sales Manager and he was there on the time and expense of Cummer-Graham Company fulfilling the duties of his office (R. 95)."

FREDERICK C. HOGUE (R. 120-141, 155-159), commonly known as F. C. Hogue. Witness testifies that he is a merchandising broker doing business with the Cummer-Graham Company, selling packages, fruit packages. He says:

> "They ship me packages, and I sell them. Well, I sell these bushel baskets or half-bushel baskets and pea tubs, and they ship them up here, and I deliver them and invoice for them and collect for them (R. 102). * * * I keep a record of each car of packages."

The witness had an extremely limited knowledge as to how records were kept of his business with defend-

ant, except that he had a separate file for each car in which would be placed the letters, etc., relating to such car.

The witness then refers to his contracts with defendant, and said C. H. Kinney negotiated the contracts with him (R. 105).

The witness makes clear and states repeatedly that he operated on a commission basis (R. 107), his commission being 7 per cent of the sales price (R. 138), and presumably that explains why his books were not of the form customarily kept by merchants.

The witness explains (R. 113) that if he needs to fill an order quickly he will have roller cars "diverted" to him. Otherwise he might send an order to the Paris office and have the cars shipped after the order had been placed.

Questioned further with reference to the bookkeeping on roller cars which had been consigned to the defendant at Nampa, he said he would arrange with C. H. Kinney to take such roller cars (R. 114).

> "Q. Assume that the roller cars were in Idaho and you notified Mr. Kinney that you wanted one or more of those cars: When would they be invoiced to you?
>
> "A. Well, the first thing I would get would be the car number, and the contents, so I would know how to make my billing, and then that would be invoiced right after, direct from Texas, immediately upon receipt of the information they got.

"Q. Now, who would give them the information, you or Mr. Kinney, or both?

"A. Well, Mr. Kinney, probably if he was here.

"Q. He would give them the information, and then they would invoice you?

"A. Yes."

And again (R. 115):

"If I got hold of a car at Nampa, for example, it didn't belong to me until I had got the car and they had invoiced it to me."

"Q. And in order to get it, you would probably take up with Mr. Kinney, if he was here, the matter of taking over that car, and he would notify Paris, and they would invoice it to you, and you would pay for it after you received the invoice; is that correct?

"A. Yes."

Again he says on cross-examination (R. 118) that roller cars are sent out during the busiest part of the season for the purpose of taking care of the business of himself and Reilly Atkinson and any other salesmen who handle the Cummer-Graham products.

And again (R. 121) that roller cars are not invoiced to him until he informs Mr. Kinney that he wants the car.

"Q. In other words, there would be no invoice and no billing to you on those roller cars unless you diverted it or ordered the car.

"A. That's right.

"Q. So as to those roller cars, they were Cummer-Graham Company property until you directed Mr. Kinney or someone to divert it to you, or you ordered it, in which event it would be invoiced to you; is that right?

"A. That's right" (R. 122).

The witness gets no commission on any sales unless the sale is made by or through him—that if Mr. Kinney sells direct to other dealers or growers no commission is paid to the witness (R. 124).

The witness was then asked as to his answer to the Notice of Garnishment in which he stated that he had on hand upwards of 8,000 baskets belonging to the defendant. When asked how he obtained possession of those baskets he said (R. 124-25):

"Well, they were shipped to me."

"Q. Well, now, would they be carried over from one season to another?

"A. Well, yes, they could be.

"Q. Well, now, just explain how you would carry over baskets from one season to another for Cummer-Graham Company.

"A. Well, you see they shipped the merchandise to me on consignment, and so my picture in the thing is that I either have to have the money or the inventory, one of the two.

"Q. In other words, your contract is one whereby they ship the baskets to you on your order and you sell them on a commission, and you either

have to return the baskets or the money; is that true?

"A. Either have the baskets or the money; that's true.

"Q. In other words the baskets belong to them, if you do not sell them?

"A. Yes.

"Q. (R. 127). And then you store them for the winter for Cummer-Graham, and then when spring comes Cummer-Graham will put new prices on those baskets?

"A. Well, I am believing they will. They haven't yet.

"Q. And the price will fluctuate from year to year.

"A. Yes."

"Q. (R. 129). If the price changes, that does not affect you excepting that you can not sell them excepting at the new price; is that true?

"A. Yes.

"Q. And when you do sell them, the invoice to you means nothing—the old invoice means nothing, because you merely sell on a commission; is that true?

"A. Yes, I think that would be right.

"Q. (R. 132). When you don't sell them, do you advise them as to the inventory, or do they inquire of you as to the inventory?

"A. We tell them what we have that is unsold.

"Q. And what do they do, then, with respect to that inventory you send them?

"A. Well, that just goes back to the total amount of the shipments they have sent up here, should equal what we have on hand plus the cash we have sent them.

"Q. (R. 138). What does the commission amount to?

"A. Seven per cent.

"Q. Under your contract with Cummer-Graham the only compensation you receive for all your service is this seven per cent on the selling price less freight; isn't that true?

"A. Yes.

"Q. Regardless of what the selling price or invoice may be?

"A. Yes, I think that's right."

The witness was then questioned with reference to the selling price the next season for the baskets that were carried over and as to how he would ascertain the selling price for that year if it was not the same as the original invoice price, and as to that he said (R. 141):

"I would ask them what I am supposed to sell them for."

It is clear from the witness' testimony that he was a selling agent operating on a commission basis—that baskets were consigned to him for sale and that he was not expected to pay for them until they were sold. The selling price was subject to regulation by the defendant as owner of the baskets.

The witness (R. 156) identified a bill of lading of August 20, 1941, for a roller car which had been

diverted to the witness. It was introduced in evidence as plaintiff's Exhibit No. 5. This exhibit is an unqualified shipment to Cummer-Graham Company as consignee at Nampa, Idaho (R. 204). It is not in care of any of its distributors or local dealers. It clearly contradicts the testimony of defendant's representatives that such roller cars were shipped in care of its dealers in the state.

The witness was again asked to produce his contract with the defendant, but he claimed that he was unable to find it (R. 156). He promised to look further and to send it to the reporter who took the deposition (R. 156), but this he failed to do. The reporter states in his certificate (R. 184-185) that he called the witness Frederick C. Hogue on March 27, 1942, by long distance telephone to ascertain if he had found the contract, and the witness reported that he had been unable to find it. The contracts between defendant and its distributors or agents in Idaho could not be found, either by the officers of defendant or their agents when desired for examination or use in this case, and the parties to the contracts claimed only a very vague recollection as to the terms or provisions of the contracts.

F. H. HOGUE: Witness has been in the fruit packing and shipping business for upwards of twenty-five or thirty years at Payette. He produced a "Certificate of Retail Dealer" under the Robinson-Patman Act, plaintiff's Exhibit 2 (R. 193), which the defendant required in connection with the sale of their baskets.

Witness testified that on February 10, 1939, he gave

a mortgage to J. A. McGill, president of defendant, for $33,694.00; that he was not indebted to Mr. McGill personally for any amount whatsoever. The mortgage covered nine pieces of property in Payette County, being the same properties that in February, 1941, were conveyed to C. N. Kinney, father of C. H. Kinney, in trust for the creditors of F.H. Hogue. At the time the mortgage was given the witness was indebted in the amount stated to the *Basket Sales Company,* at one time a selling agency for defendant and other affiliated and independent basket manufacturers (R. 180).

The witness also testified (R. 146-147) that defendant's vice-president, Mr. De Shong, was the person who negotiated with the witness and arranged for the conveyance to C. N. Kinney of a substantial part of the property of the witness to be held in trust for his creditors, being the same property on which J. A. McGill, the defendant's president, had a mortgage, as stated above. About 40 per cent or more of the baskets sold by the Basket Sales Company were the property of defendant (R. 180).

SCOTT BRUBAKER: This witness testified that he is now trustee in place of C. N. Kinney, who died in December, 1941. The petition for the appointment of a successor trustee to C. N. Kinney (Exhibit 10) was signed by F. H. Hogue and approved by J. A. McGill, by C. H. Kinney, agent, and the latter gave much attention to these properties while held in trust for Hogue's creditors, and while C. H. Kinney was in Idaho at the expense and on the time of the defendant. The officers of defendant testified that the defendant had no interest in the property so held in trust and

was not a creditor of F. H. Hogue. Nevertheless, C. N. Kinney, in his official report as trustee in 1941 to the creditors of F. H. Hogue, stated that Cummer-Graham Company had advanced to him as trustee $7,000.00 during that year to be used for caring for and managing the trust property held by the trustee for the benefit of creditors (R. 25-26).

J. C. PALUMBO: This witness testifies (R. 159-163) that he purchased a roller car from A. V. Kinney in 1940. The deal was made at Payette and the car had been shipped about a week prior to the date the witness purchased the car. Plaintiff's Exhibit 6 includes a bill of lading which shows that the shipment was made to *defendant* as consignee at Nampa and not in care of any dealer. The original invoice was to defendant itself dated September 5, 1940. Attached is a letter from Mr. Palumbo addressed to A. V. Kinney at Payette, Idaho, enclosing check in payment for the car, dated September 23, 1940. There is also a letter from A. V. Kinney at Payette dated September 11 to Palumbo stating that he had diverted the car to Palumbo. This transaction took place at the time when A. V. Kinney, as sales manager for defendant, had an office at Payette, Idaho, for approximately three months.

F. H. DE HAVEN: He is a general representative of plaintiff. He is acquainted with all the officers of the defendant and its affiliated corporations. He names the officers of defendant and its affiliated companies (R. 164-67). A mere glance at the list of officers shows the intercorporate relations of a number of basket

manufacturers apparently dominated or controlled by defendant. Mr. McGill is president of defendant and C. H. Kinney is sales manager, but C. H. Kinney is president of Veneer Products Company and J. A. McGill is vice-president and A. C. Mackin is secretary and treasurer of both. A. V. Kinney (R. 167) is general manager of F. E. Prince Co.

Mr. De Haven had been intimately associated with all of these officers and representatives of defendant and the affiliated companies for many years because they were manufacturing baskets under licenses from plaintiff and it was part of Mr. DeHaven's business to keep in close touch with the sale of the baskets, as the royalty payments to plaintiff were based on the number of baskets sold. He testifies from an intimate knowledge of defendant's business and the manner in which the same was carried on through its various officers and representatives. These men had talked freely with Mr. De Haven regarding their business. He had met them and was associated with them in both Idaho and Texas. With reference to sales and collections made by C. H. Kinney and A. V. Kinney for defendant, he says (R. 168-169):

> "I have seen signed orders in their possession. I have also seen checks in their possession in payment of baskets which they have sold."

R. 170-71:

> "I have been present and have heard A. V. Kinney and C. H. Kinney both, for that matter, telephone the railroad companies and divert cars

which were consigned to the Cummer-Graham Company in some one place or another, usually in Nampa, Idaho. They would give instructions to the railroad clerk to divert a car, and describe the car by number and contents; and I have heard them subsequent to diverting the car telephone the customers and tell them that such car had been diverted and would be on track in such and such a place."

"I have seen invoices and bills of lading on cars that were shipped by Cummer-Graham Company into Idaho with the bill of lading reading, 'Consigned to Cummer-Graham Company, Nampa, Idaho'."

He stated (R. 172) that he knew that defendant has in recent years sold direct to growers in Idaho. He stated that the defendant under the license contract reported to plaintiff (R. 173) "every month on all sales made by their company in various states, and they report baskets delivered."

Sample reports were introduced in evidence as Exhibit 7 and are attached to the deposition.

When asked what he knew about the Kinneys making collections he said (R. 174):

"I saw a check in Arthur, or A. V., Kinney's possession; rather, he showed it to me, made payable to the Cummer-Graham Company by F. C. Marquardson, I believe, at Buhl, Idaho, in payment of baskets used in the year 1939. The amount of that check was $3,506.48."

When asked if the officers of defendant had ever made any statements with reference to ownership of Veneer Products Company, he said (R. 175):

> "I have heard general discussion about Veneer Products Company in which Mr. J. A. McGill was present, and in which Mr. C. H. Kinney was present, and myself, and other members of our firm. In that discussion it has been disclosed that C. H. Kinney, president of the Veneer Products Company, holds controlling interest of the Veneer Products Company and that he has accepted Cummer-Graham stock in payment of assets that Cummer-Graham has taken from the Veneer Products Company or acquired."

When asked if the two companies kept separate records, he said:

> "They do not keep separate records."

He then identified a report for the month of March, 1941, made to plaintiff by the defendant for itself and Veneer Products Company. It was introduced as plaintiff's Exhibit 8. He says further (R. 176):

> "May I state further that it had attached the check made payable to us in payment of license fees due for the sales shown on the report, and that the attached voucher is from a Cummer-Graham check in payment of those license fees for both the Veneer Products and Cummer-Graham, which is a customary practice."

He testified further (R. 176-7) that C. H. Kinney

negotiated contracts in Idaho with dealers; that he acted for defendant on most important matters. He says:

> "I have already stated that I saw him and heard him divert cars to customers and so advise the customers that he had done so. I saw him and heard him give instructions to his brother, A. V. Kinney, who was then a salesman for Cummer-Graham Company. I saw him do many things that I can't specifically describe at the moment, as being a representative in the territory of a firm that placed responsibility upon his shoulders."

The witness stated (R. 178-9) that more baskets manufactured under licenses issued from plaintiff were sold in the State of Idaho than in any other state by the defendant Cummer-Graham Company—that the number of baskets sold in Idaho aggregated approximately two hundred cars annually of an approximate gross value of $200,000.00. He testified also (R. 180) that the defendants sold through the Basket Sales Company at least 40 per cent of all the baskets sold by that company.

Counsel for appellant refer in their brief to the failure of appellee to put in evidence the contract or contracts between appellant and its Idaho distributors or agents. The simple answer to that criticism is that *appellant refused to produce the contract.*

That appellant was doing a very extensive business in Idaho is obvious from the evidence. On every basket sold in the state a royalty accrued to appellee. In no

other state did appellant sell such a large number of the baskets manufactured under its license from the appellee. In the State of Idaho appellant had property, and money due it from its agents or distributors. The baskets which it had stored with Frederick C. Hogue were attached (8,108 baskets of the value of $1,279.48) and upwards of $8,000.00 due it from Hogue was garnisheed when the action was commenced, and this property remained in *custodia legis* until after the summary judgment was entered.

There are numerous cases where the Court has held that the activities of a foreign corporation in a state have been sufficient to establish the corporation's presence in the state to support the service of process on its agent, but in none of the reported cases do we believe the activities of the corporation and the high rank of the agent measure up to the activities of appellant and the rank of its general sales manager on whom service was made in this case. He was not an ordinary employee. He was a man on whom great responsibility was placed. He was sales manager for 26 states and president of an important affiliated company, or subsidiary.

Appellant claims that the credits and orders had to be approved by the Board of Directors or officers at Paris, Texas. That is a strange contention if we accept their other contention that they had only *two distributors* in Idaho—Reilly Atkinson and Company at Boise and Frederick C. Hogue at Payette. They had been acting for the corporation for many years and their credit rating had been approved, presumably, once for all. The fact is, and the proof shows, that C. H. Kinney, and

from time to time other officers of defendant, spent much time in Idaho to develop a market for their baskets and make sales to growers; that in order to give quick service so as to compete with dealers that complied with the law and had their baskets on hand within the state, appellant resorted to the scheme of using the "roller cars" during the packing season when baskets would be required on short notice. When a grower needed baskets they would order one of these roller cars to be transferred from the Nampa railroad yard to the grower's siding. Such sales were obviously a purely intrastate matter, as much so as if it had been made out of a warehouse in Nampa. The baskets in the roller car at Nampa were the property of appellant. The baskets were in Idaho when the sale was made, and the contract of sale was made in Idaho, frequently by appellant's sales manager, who operated either from his office or his hotel room or from the office of one of the distributors.

It is significant that the distributors were paid on a commission basis and that the distributors' selling price was fixed from time to time by appellant. If these distributors were the *owners of the baskets* by direct purchase from appellant they would have fixed their own selling price. It is significant also that the "carry over" baskets from one season to another were baskets that had not been purchased by the distributors. They were baskets from the roller cars that were in Idaho at the close of the season. To save the expense of returning them to the factory they were stored in the warehouses of the distributors, but the price of the baskets for the next season was fixed by

appellant and these distributors were not required to pay for them until they were sold.

The contention that appellant was engaged purely in interstate commerce is obviously not sustained by the evidence. None of the roller cars were shipped on a *purchase order*. They were consigned to appellant in Idaho as much as if appellant had had a warehouse in which to store them when they reached that state. The shipment of the cars into Idaho was, of course, an interstate shipment, but defendant's business was not interstate commerce in the sense that the term "interstate commerce" is used in determining whether a corporation is "doing business" in a state. The claim of appellant that it charged the roller cars to its distributors and then made a counter-credit when the roller car was sold in Idaho to someone else is but a subterfuge resorted to in an attempt to evade the laws of Idaho relative to foreign corporations having to qualify before they can do business in the state and pay a license tax and be subjected to other taxes.

Defendant Was Legally Served with Process in Idaho

We deem it unnecessary to quote at length from authorities on the validity of the service of process on C. H. Kinney, Sales Manager for appellant. In paragraphs 1 to 9 of the "Brief of the Argument" many authorities have been cited. This Court has discussed the question in Liquid Veneer Corp. vs. Smuckler, 90 F. (2d) 196, and in Denver R.G. R. Co. vs. Roller, 100 F. 738. The Eighth Circuit in the very recent case of Bendix Home Appliances vs. Radio Accessories

Co., 129 F. (2d) 177 cited with approval the decision of this Court in the Liquid Veneer Corporation case. It said:

> "The activities of a foreign corporation which are sufficient to make it amenable to process within a state by service upon an officer of the state or upon the corporation may be less than those required to subject the corporation to the provisions of the state's licensing and taxation statutes."

A number of cases are cited in paragraph 4 of the Brief of the Argument showing the kind of activity and the limited authority of the agent that has been held sufficient to sustain the service of process.

In Beach vs. Kerr Turbine Co., 243 F. 706, a workman drawing $4.00 per day who was assisting in installing a turbine wheel was held to come within the term "managing agent" as used in the statutes of Ohio and service upon him was held valid.

Substantially to the same effect are the decisions in Nickerson vs. Warren City Tank & Boiler Co., 223 F. 843, and Rendleman vs. Niagara Sprayer Co., 16 F. (2d) 122. The annotations in 113 A.L.R. commencing on page 9 and extending to page 172 are an illuminating treatise on the subject.

The appellant was doing business in Idaho within the meaning of the foreign corporation laws of that state sufficient to require it to qualify under such laws and pay a license tax and appoint the statutory agent for service of process.

The evidence above referred to and other evidence

in the record and the exhibits introduced but not printed in full in the record show clearly that appellant was doing more business than simply carrying on interstate commerce. Its activities were obviously of an extent that required it to qualify as a foreign corporation.

The Supreme Court of Idaho in the case of Boise Flying Service vs. General Motors Acceptance Corporation, 55 Idaho 5, 16-17, 36 Pac. (2d) 813, construes the statutes on what constitutes "doing business" in the state. The Court says:

> "The respondent is a corporation; an artificial, and not a natural, person. Its presence in the state can only be manifested by its officers, agents, or representatives, through and by whom it must necessarily act in the transaction of its business.
>
> "Its course of conduct in purchasing paper in this state, and accepting payments on such paper in this state, and maintaining a representative in the state for that purpose, manifests the *presence* of respondent there, and constitutes the doing of business, sufficient to make it amenable to the process of the courts of this state.
>
> "'The presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from

the ordinary process of the courts of the state.' International Harvester Co. vs. Kentucky, 234 U.S. 579 (34 Sup. Ct. 944), 58 L. Ed. 1479, and cases therein cited. See also the recent case of Steele vs. Western Union Telegraph Co. (206 N.C. 220) 173 S.E. 583.

"In conclusion, we may state that there is one precise test of the nature or extent of the business that must be done in order to constitute 'doing business.' All that is requisite is that enough business be done to enable the Court to say that the corporation is present in the state; if a foreign corporation is doing acts of business in a state sufficient to show an intent to make it an effective part of its field of operation in the business for which it was created, such a corporation has subjected itself to the jurisdiction of that state. (18 Fletcher on Corporations, sec. 8713.)"

Appellant, by Its Activities in Idaho, Has Waived the Right to Object to Suit in the Federal Court for that State.

Defendant admits it has not complied with the laws of the State of Idaho relating to foreign corporations. It has not paid the qualification fee required under such laws nor the annual license tax, income or other taxes, or appointed a statutory agent on whom process may be served. The facts alleged in the amended complaint are admitted by the motions and supported by the evidence.

Defendant seeks all the trade advantages that may be had under the laws of the state, but claims that by

crafty maneuvers it has avoided subjecting itself to any of the burdens imposed on other foreign corporations that have complied with the law; that by the use of "roller cars" and fictitiously charging them on its books to its agents, who did not order them, it must be held that it is engaged only in interstate commerce.

Sec. 29-502, Idaho Code Annotated, 1932, provides that a foreign corporation must, in addition to filing certified copies of its Articles of Incorporation with the Secretary of State and County Recorder and paying the qualifying fees and annual license tax,

> "Must also within three months from the time of commencement to do business in this state, designate some person in the county in which the principal place of business of such corporation in the state is situated, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid must file such designation for record in the office of the secretary of state, and file for record in the office of the county recorder of such county a copy of such designation, duly certified by such secretary of state, * * *
>
> "It is lawful to serve on such person so designated any process issued as aforesaid, and such service must be deemed a valid service thereof."

It will be noted that the Idaho statute does not limit the actions against such foreign corporations to either *citizens of the state* or to *causes of action that arise within the state* or arise from *business transacted in the state.*

In this respect it is different from the Montana statute which was considered by this Court in North Butte Mining Co. vs. Tripp, 128 F. (2d) 588. The Montana law provided that the corporation must file a certificate "certifying that said corporation * * * has consented to be sued in the courts of this state, *upon all causes of action arising against it in this state.*" Because of the provision of the statute this Court was compelled to hold that a suit could not be brought against a foreign corporation on a cause of action that arose in another state.

The Supreme Court of Idaho in Jennings vs. Idaho Ry. L. and P. Co., 26 Ida. 703, 146 Pac. 101, sustained a judgment in an attachment proceeding against a Maine corporation brought by a citizen of Pennsylvania on a note made in the City of New York, but payable in the City of Pittsburgh. We cite this merely to show that under the Idaho statutes the courts are open to citizens of other states on causes of action originating in other states against foreign corporations doing business in the State of Idaho. Authorities to the same effect under the laws of other states are cited in the Brief of the Argument (par. 8).

Appellant cites and relies upon a few of the older cases decided by the Supreme Court of the United States, including Old Wayne Life Assoc. vs. McDonough. These cases have lately been distinguished and qualified. They have no application to a state of facts such as we have in the case at bar and we deem it sufficient to refer to later decisions which have explained or pointed out the reasons why those decisions have no application here.

See Vilter Mfg. Co. vs. Rolaff (8 Cir.), 110 F. (2d) 491.

Brown vs. Canadian Pac. Ry. Co., 25 F. Sup. 566.

Lipe vs. Carolina C. & O. Co., 123 S. C. 515, 116 S.E. 101, 30 A.L.R. 248.

Under the broad rule lately established by the Supreme Court of the United States in Neirbo Co. vs. Bethlehem Shipbuilding Corp., 308 U.S. 165, 84 L. Ed. 167, 128 A.L.R. 1437, the law is now firmly settled that the objection to the *venue* of the action under Sec. 112, Title 28, U.S.C.A., may be waived by express consent or by failure to object. The rule established by that decision is familiar to this Court, and no extended argument on its application here seems necessary. Referring to the provisions of that statute the Supreme Court said:

> "Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. Commercial Casualty Ins. Co. vs. Consolidated Stone Co., supra. Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. *The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind Sec. 51,* which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in

> any district, or wherever found.' (General Invest. Co. vs. Lake Shore & M.S.R. Co., supra; 260 U.S. at 275, 67 L. Ed. 254, 43 S. Ct. 106.)" (Our italics.)

There has been no modification of the decision in the Neirbo case, but it was approved and followed in Oklahoma Packing Co. vs. Oklahoma Gas & Elec. Co., 309 U.S. 4, 84 L. Ed. 537, and on many occasions it has been followed and applied by the district courts and the courts of appeal.

The Court says in the opinion in the Neirbo case that a foreign corporation by the appointment of a statutory agent for the service of process, waives its privilege under the venue statute, and it may waive it by other acts—it may waive it by entering a general appearance without raising the venue question; and it may waive it by *its conduct in other ways.* The Supreme Court said that "the essence of the matter is that *courts affix to conduct consequences as to place of suit*" * * *. (Our italics.)

When a corporation like defendant comes into a state and in violation of its laws is "doing business" in the state on a scale like the defendant has been doing in Idaho, it should not be heard to object that it has not by its conduct waived its right to be sued only in the state of its incorporation. Every order which it accepted for the sale of baskets was a contract; every representation that its salesmen made to purchasers might be the basis of an action against it. It would seem most illogical to argue that because it did not comply with the laws of the state, all actions against it on representations or agreements must be brought

in the State of Texas. We think by its conduct it has waived as completely its privilege under the venue statute as if it had consented to suit in the state by appointing a statutory agent.

Appellant apparently does not question that it comes under the rule in the Nierbo case if the Court should conclude that it is "doing business" in Idaho. Its contention is that it was not present in the State of Idaho and was not "doing business" therein of a character or to an extent or amount that would require it to qualify as a foreign corporation under the laws of that state. The sufficient answer to that is the decision of the Idaho Supreme Court in Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 16-17, 36 Pac. (2d) 813.

We think it requires no argument that appellant could not, by an evasion or defiance of the laws of that state, obtain privileges and advantages in a Court that it could not have or enjoy if it had complied with the laws of the state.

The Supreme Court of South Carolina in Lipe vs. South Carolina C. & O. Ry. Co., 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248, referring to this same matter, said:

> "To go further and hold that, because the foreign corporation, doing business in the state through agents amenable to process, has not complied with the state laws, and has not intended to subject itself to the jurisdiction of the state courts, it may not be held liable in the same manner and to the same extent as another foreign corporation legally doing similar business, *would amount to penalizing*

the law-abiding foreign corporation, and placing a premium upon outlawry." (Our italics.)

In our opinion the case was correctly decided by the District Court and the record contains no error. Wherefore, we respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,

RICHARDS & HAGA,
OLIVER O. HAGA,
J. L. EBERLE,
Of Boise, Idaho.
Attorneys for Appellee.

January 22, 1943.

No. 10279

United States
Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,
Appellee.

Reply Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

GEORGE DONART,
Weiser, Idaho,

FREDERICK P. CRANSTON,
409 Equitable Bldg.,
Denver, Colorado,
Attorneys for Appellants.

PEERLESS PRINTING CO., DENVER

INDEX

TABLE OF CASES

STATUTES

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

GEORGE DONART
Weiser, Idaho

FREDERICK P. CRANSTON
409 Equitable Building
Denver, Colorado,
Attorneys for Appellant.

RICHARDS & HAGA
Boise, Idaho,
Attorneys for Appellee.

WHAT THE OPENING BRIEF ESTABLISHED

The opening brief established:

I. Where there is a discrepancy or uncertainty in the facts, the position most favorable to the party against whom the summary judgment is sought to be entered must be accepted as true.

II. The doing of business in a state without qualifying as a foreign corporation does not constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in said state.

III. Defendant was not doing business in Idaho at the time the alleged claim arose or at the time of the commencement of the action.

IV. Service was not properly made upon defendant.

WHAT THE APPELLEE'S BRIEF FAILED TO DISCUSS

1. Plaintiff's brief does not even discuss the first of the above points. The nearest it comes to mentioning it is the statement found on page 14 to the effect that the *propriety* of the summary judgment was questioned followed by a statement as to the pleadings and the taking of depositions. The first point has not been overthrown.

2. The fourth point is not met squarely. The argument of the opening brief (pp. 35, 36) was that under the Idaho Code in an action against a foreign corporation, the doing of business was a necessary element before any service could be made upon anybody. A great part of plaintiff's brief is directed toward establishing that

the defendant's sales manager, C. H. Kinney, was a proper person upon whom to make service. The opening brief did not controvert such principle. The whole argument in the opening brief (pp. 35 and 36) with reference to that issue was that nobody was a proper person because defendant was not doing business in Idaho. The portion of plaintiff's brief directed to the importance of C. H. Kinney's position is beside the point and will not be here discussed. The issue on the fourth point established in the opening brief depends not upon C. H. Kinney's status but upon whether or not defendant was doing business in Idaho. The answer to the third point therefore answers the fourth point.

THE ISSUES LEFT TO DISCUSS

This leaves the issues as follows:

1. Does the doing of business in a state without qualifying as a foreign corporation constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in the state?

2. Was defendant doing business in Idaho?

PLAINTIFF FAILS TO ANSWER THE ARGUMENT OF THE OPENING BRIEF WHICH ESTABLISHED THAT THE DOING OF BUSINESS IN A STATE WITHOUT QUALIFYING AS A FOREIGN CORPORATION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT TO OBJECT TO IMPROPER VENUE IN AN ACTION TO ENFORCE A CONTRACT NOT MADE IN AND NOT TO BE PERFORMED IN THE STATE.

The only argument of plaintiff's brief on this point is on page 42 and is that *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 345, referred to on page 17 of the opening brief had been distinguished and qualified. The argument on page 16 of the opening brief with reference to the rule of *In re Keasbey and Mattison Co.,* 160 U.S. 221, 231; 16 S. Ct. 273, 40 L. Ed. 402, was not referred to in plaintiff's brief and it may therefore be considered that such rule is in effect except where under the rule of *Neirbo v. Bethlehem Ship Building Corp.,* 308 U.S. 165; 60 S. Ct. 153, 84 L. Ed. 167, there has been an *express* appointment, which in this case there has not been. The failure of plaintiff to overthrow the rule of the *Keasbey* case is in itself sufficient to require the reversal of the judgment below.

Furthermore, plaintiff misconceives the effect of the cases cited on page 43 of its brief which it states distinguish and qualify the *Old Wayne* case. Lower United States courts and the Supreme Court of South Carolina cannot on a question relating to venue in the United States courts, alter a rule established by the United States Supreme Court. The Federal cases there cited do not in any respect alter the rule. The South Carolina case of *Lipe v. Carolina C. & O. Ry. Co.,* 123 S. Ct. 515, 116 S.E. 101, 30 A.L.R. 248, held that the courts of that state had jurisdiction of an action against a foreign corporation doing business in the state, a proposition not questioned here, but having nothing to do with the venue limitations of the Act of Congress.

The argument of the opening brief on this matter therefore remains unrefuted. There remains to consider the third point established in the opening brief.

PLAINTIFF FAILS TO ANSWER THE ARGUMENT OF THE OPENING BRIEF WHICH ESTABLISHED THAT DEFENDANT WAS NOT DOING BUSINESS IN IDAHO.

After analyzing all of the facts claimed to constitute the doing of business, the defendant on pages 20 to 35 of the opening brief discussed completely each class of act and furnished authorities holding that such acts did not constitute the doing of business within the state. None of the cases therein cited are even referred to in plaintiff's brief, nor is any attempt made to overthrow any of the sub-principles upon which the main principle is based. By this failure, plaintiff either admits the validity of the principles set forth in the opening brief or else it expects the members of this court to undertake the research and formulate the answering arguments which its counsel were unable or unwilling to undertake and formulate themselves. We will assume plaintiff did not expect the latter and it must therefore admit the validity of the arguments set forth in the opening brief as follows.

1. *Defendant was not doing business in Idaho* (p. 20 opening brief).

a. The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments from outside of Idaho does not constitute doing business in Idaho into which the goods are shipped (p. 20 of opening brief).

b. The sending of so-called "roller cars" into Idaho, and diverting them after arrival in Idaho

was not the doing of business in Idaho (p. 23 of opening brief).

3. The retention of title to merchandise held on consignment is not the doing of business in the state (p. 26 of opening brief).

d. The facts relative to the land held as security do not constitute the doing of business in Idaho (p. 32 of opening brief).

As a substitute for a direct answer and for a straight forward meeting of the issues, plaintiff on pages 9 to 14 of its brief sets forth, not in any logical order, eleven statements, which it contends govern the case.

It is probably better in this reply brief to follow the same order in discussing these points, although this plan will involve some repetition. Accordingly, these will now be discussed. In this discussion, attention will be called to the facts of the cases cited by Plaintiff, because the application of the rule announced is necessarily limited and affected by the facts to which the rule was applied.

1. The rule that less may be required to subject a corporation to service of process than is required to subject the corporation to the state's licensing and taxation statutes, does not settle the issue here. None of the cases cited in support of the rule state how much less or what is required, and all of them deal with situations where the corporation was unquestionably doing business, and was amenable to the licensing and taxation statutes of the state as well as to service of process.

Boise Flying Service v. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813, deals with an entirely differ-

ent situation than that present here. In that case, the defendant admitted in several state court suits that it was doing business in Idaho, and falsely stated that it had complied with its laws, and was authorized to transact business therein. These were not statements of an alleged agent who might have been unauthorized but were the statements of its Assistant Secretary who was admitted to be authorized to act for it. Furthermore, there the defendant bought commercial paper in Idaho, repossessed radios, refrigerators and automobiles in Idaho, stored them in Idaho, sold them in Idaho, and maintained a representative who resided in Idaho. Obviously, there is no interstate commerce feature to any of these acts. Accordingly, this case furnishes no aid in the establishment of a rule applicable to the facts in issue here, and is of course limited to cases where similar facts exist.

It was anticipated in the opening brief that plaintiff would cite in its brief cases wherein the doing of business would be predicated upon the fact that the defendant carried stocks in a warehouse in the state, and it was stated in the opening brief that comment thereon would be reserved for the reply brief. Such a case was cited in support of the above alleged rule on page 9 of the plaintiff's brief, being the case of *Liquid Veneer Corp. v. Smuckler,* (9 C.C.A.) 90 F. (2d) 196. The defendant in that case always carried merchandise stocks on hand in the state and shipments were made from the warehouse in San Francisco, to customers in Los Angeles. Clearly, this was not an interstate commerce transaction, and clearly this was doing business in the state. This case, accordingly, is of no help.

The next case cited is *Denver & R. G. R. Co. v. Roller,* (9 C.C.A.) 100 F. 738. There the defendant maintained a business office in San Francisco with its name on the door. Of course, this constituted doing business in California. Numerous authorities could be cited to sustain that position, but likewise, the facts there are not similar to those in this case and afford no authority for this case.

The last case cited in support of that alleged principle is *Bendix Home Appliances v. Radio Accessories Co.,* (8 C.C.A.) 129 F. (2d) 177. On page 181 of the opinion, the statement is made that the evidence introduced at the trial has not been brought into the record, and the appellate court must therefore assume that the trial court's judgment is correct. Since this case fails to state the evidence upon which it was ascertained that the defendant was doing business, there are no facts which can be compared with the facts here to aid in the formulation of any applicable rule.

2. The next alleged rule is that a corporation is engaged in transacting business within the state if it transacts any business of any substantial character. None of the cases cited in support of this alleged rule refute the proposition that the business of a substantial character must nevertheless be business within the state, not interstate commerce business. If the business is interstate commerce it makes no difference how vast or substantial it may be. It still remains interstate commerce. Plaintiff cannot cite, and makes no attempt to cite, any authority to support the rule for which by implication it contends that a vast and extensive *interstate* commerce business becomes transformed into *intrastate* commerce

simply because it is vast and extensive in character. All of the cases cited in support of the rule asserted are cases where there is no question but that business was being done by the foreign corporation defendant in the state.

In the case of *Brown v. Canadian Pac. Ry. Co.,* 25 F. Sup. 566, the defendant brought suit in the United States Court for the Western District of New York in which Buffalo is located. The defendant ran its engines and cars into Buffalo, maintained an office in Buffalo with fourteen employees, and had its name on the door, and issued and sold tickets under its own name. Of course, this was doing business within the state, and of course this case is not applicable here.

The defendant in *Vilter Mfg. Co. v. Rolaff,* (8 C.C.A.) 110 F. (2d) 491, had offices in the state with its name listed in the building and telephone directories, which clearly constitute doing business in the state. This element being absent in the present case renders the cited case not in point.

The same is true of *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915. There a suite of offices and eight employees was maintained by the defendant, the defendant had its name on the door, and clearly maintained an office and was doing business. The facts in that case are likewise dissimilar.

3. Plaintiff's brief states that a corporation is present in any state where its officers or agents transact business in behalf of a corporation. This in effect is stating that a corporation is doing business in a state, when it is doing business in the state. This argument in a circle

is continued by the further statement that if the corporation is present in the state, process may be served on the officer or agent in charge of the business. As already indicated, the objection to service upon C. H. Kinney was made not on the ground that he would not have been a proper agent if the corporation had been doing business in the state, but that, because as set forth on pages 35 and 36 of the opening brief no person was a proper person when the corporation was not doing business in the state. This statement of law is therefore not applicable because the sole issue is "was the defendant doing business in Idaho." It is therefore unnecessary to discuss the cases cited in support of that principle.

4. The proposition stated under 4 is to the same effect. If the corporation had been doing business it may be conceded that C. H. Kinny would have been a proper agent for service of process but since the corporation was not business no one was a proper agent for the service of process in Idaho.

5. Proposition No. 5 stated on page 11 of plaintiff's brief can be assumed to be a correct statement of the law, but as above stated, if the corporation was not doing business in Idaho it makes no difference upon whom service was made, since under the Idaho statute nobody is a proper agent for service.

6. Proposition No. 6 stated upon page 12 of plaintiff's brief that one of the tests as to whether or not a corporation is doing business is whether its acts are sufficient to show an intent to make it an effective part of its field of operation in the business in which it was created, does not mean that the transporation of mer-

chandise in interstate commerce is doing business in the state nor that any of the other acts constitute doing business. Plaintiff does not attempt to explain the application of the rule to the facts in this case. That the acts done by defendant here do not constitute doing business is fully supported by the authorities set forth in the opening brief. The case of *Boise Flying Service v. General Motors Acc. Corp.*, 55 Ida. 5, 36 Pac. (2d) 813, which is cited in support of the above rule has already been discussed, and it has been shown that the facts in that case are entirely different, and the case furnishes no authority applicable here.

7. The statement that the fact that the business done by a corporation is interstate in character does not render it immune from process of the courts of a state, does not meet the issue in this case. The issue in this case is whether or not the defendant was doing business in Idaho so as to constitute a waiver of its rights to have the venue laid in the district of its residence or the district of the residence of the plaintiff, if an action should be brought against it in a United States court. The cases cited in support of the above rule throw no light upon this matter.

Can. Pac. Ry. Co. v. Sullivan, (1 C.C.A.) 126 F. (2d) 433, is a case where the defendant had appointed the Commissioner of Corporations as agent for service of process, and appointment had not been revoked. This is in accord with and not beyond the rule of the *Neirbo* case discussed in the opening brief, and the reasons why that rule is not applicable here are set forth on pages 15, 16 and 17 of that brief.

International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, is a case where the foreign corporation violated a criminal statute of the state and was prosecuted in the state court. The construction of the Act of Congress which governs this case was of course not discussed.

The case of *Boise Flying Service v. General Motors Acc. Corp.,* 55 Ida. 5, 36 Pac. (2d) 813, has already been discussed and shown to be inapplicable.

8. The principle that a foreign corporation may be sued on a transitory cause of action in any jurisdiction in which it can be found and service made is simply a statement that a foreign corporation may be sued in *any state court* of any state where it may be doing business, and where service may be obtained. The cases are all state court suits except *Vilter Manufacturing Co. v. Rolaff,* 110 F. (2d) 491, and this case was originally brought in the state court and removed to the United States court and the venue statute was therefore not applicable. Since these cases all relate to the rule in state court suits the *Keasbey* and *Old Wayne* cases discussed above (p. 4) are not and cannot be thus overthrown. As applicable to state courts, this rule may be conceded. The facts in the cases which support this rule will therefore not be discussed because not applicable.

9. The principle that a non-resident may bring an action *in a state court* in Idaho against a foreign corporation on a cause of action arising in another state, is not disputed but, of course, service must be obtained. This principle, however, does not controvert the rule respecting venue as set forth in 28 U.S. Code, Sec. 112, which

was construed in *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 34. This rule is discussed on pages 16, 17 and 18 of the opening brief and page 4 above in this brief. This action having been brought in the United States Court is subject to that rule which has not been overruled.

10. The statement that the right to have the venue laid in the district of the residence of the plaintiff or the defendant may be waived, is conceded. Under the facts of the *Neirbo* case it was held that this waiver might be by conduct, the conduct in that particular instance being the appointment of an agent for service of process which was of course a consent to be there sued. In that case, as shown in the opening brief, pages 16 and 17, the agent was appointed, and also the cause of action related to property in the district. This argument of the opening brief is still not answered in plaintiff's brief. The facts in *Oklahoma Packing Co. v. Okla. Gas & Elec. Co.,* 309 U.S. 4, 84 L. Ed. 537, are the same as in the *Neirbo* case; there an agent for service for Oklahoma had been designated.

In *Schwartz v. Aircraft Silk Hosiery,* (2d C.C.A.) 110 F. (2d) 465, 31 F. Sup. 481, defendant maintained a sale's office. In *Ward v. Studebaker Sales Corp.,* (2d C.A.A.) 113 F. (2d) 567, the facts alleged to constitute the doing of business are not set forth, so that this case affords no standard of comparison.

11. The statement is made by plaintiff that it amounts to penalizing a law abiding corporation to hold that a corporation which appoints an agent is subject to suit in the state, whereas a foreign corporation doing business in defiance of the state's laws is not so subject.

While this statement may contain more of rhetoric than of logic, let us concede that the statement as made is a correct principle of law, it is nevertheless limited in its application to state courts. The right to sue a non-qualifying foreign corporation in the state is a right to sue in the state courts. This right exists under the laws of Idaho to sue in the state courts of Idaho. However, Congress has imposed limitations upon which United States District Courts shall have jurisdiction, and has stated that only the courts of the district wherein either the plaintiff or the defendant resides shall have such jurisdiction. Whatever the rights might be in the state courts, Congress has seen fit to impose venue limitations upon the United States courts. The *Neirbo case* states that such privilege conferred by Congress may be waived by appointment of an agent in a case wherein the relief requested was to enjoin the sale of property located in the district. None of such facts constituting a waiver are present in this case. There is no placing of a premium on outlawry by according to the alleged outlaw his right to refuse to waive a privilege merely because an allegedly lawabiding corporation chooses to waive its privilege. If the defendant here was engaged in doing business in Idaho the right to sue in the courts of that state is still limited to the state courts, and by the refusal of the defendant to waive its privilege to assert its rights with respect to venue as conferred by Act of Congress, such jurisdiction is denied to the United States courts. Many causes of action which are cognizable in state courts are not cognizable in United States courts, but such does not constitute the penalizing of lawabiding citizens nor the placing of a premium upon outlawry.

DISCUSSION OF ARGUMENT OF PLAINTIFF'S BRIEF

Under the heading "Argument" commencing on page 14 plaintiff states that the defendant "seems to question the propriety of the summary judgment." The discussion of summary judgment in the opening brief commencing at page 14 stated the rule that where there is some discrepancy or uncertainty in the evidence, the position most favorable to the party against whom the summary judgment is entered must be accepted as true. Plaintiff summarizes the pleadings and the circumstances under which the summary judgment was entered but gives no authority nor any good reason why the rule as stated in the opening brief is not correct. In determining the question as to whether defendant waived its right to object to the venue of the action, the above rule set forth in the opening brief respecting summary judgments must be kept in mind.

Commencing on page 17 of the plaintiff's brief the evidence is reviewed. There is no new matter presented in the re-statement of the evidence; the statement in the opening brief was full and complete and stated every fact which is merely repeated in the plaintiff's brief. One erroneous statement appears on page 17 of plaintiff's brief which is that clearly all the witnesses were officers or representatives of defendant. This is inaccurate because customers who purchase merchandise are not representatives of the seller of the merchandise.

The plaintiff then attempts to make a big point out of the fact that the agreement between defendant and its customers could not be found. In the opening brief how-

ever it is assumed that such agreement would show a consignment contract which is what plaintiff contends it was. Nevertheless the plaintiff makes no effort to refute the argument that the shipping of goods into the state under a consignment contract if it was such a contract does not constitute doing business in the state into which the goods are shipped. The argument on pages 26 to 32 of the opening brief therefore still stands.

In the review of the evidence the plaintiff refers to testimony wherein the parties appeared to consider the relationship to be one involving the shipment of goods on consignment. Despite the ideas of the parties as to where the title to the merchandise may have vested it is doubtful if the arrangement between them constituted any title retention contract. Defendant is, of course, not bound by any answer which a garnishee may have made as to the ownership of the baskets. The evidence as shown in the opening brief indicates that the customer bought the baskets and retained the title although the date of payment of the account was postponed until the following season if the baskets were not sold. In connection with the testimony, the witness said:

> (P. 129) "Q. Well, let me put it this way, Mr. Hogue: If you actually bought these baskets at the price according to that invoice, do I understand that they could later increase that price?
>
> "A. Well, I really don't know. They would send me a price list to resell at, but whether they would raise my cost—that what you mean, I guess—I don't know, because it hasn't come up."
>
> (P. 140) "Q. Well, now, do you know whether—

say they raised the price on the ones you have now, do you know what your settlement will be with Cummer-Graham, whether you will still settle with them at the price at which they are charged to you now, or whether you would settle with them at an increased price?

"A. On the inventory I have now?

"Q. Yes.

"A. No, I don't know, because it's never happened."

Accordingly, whatever conclusions of law the witness might have had in his testimony, eventually boils down to the statement that he "does not know."

On page 28 of the plaintiff's brief a statement is made concerning the alleged consignment contracts, that the parties to the contracts claimed only a vague recollection as to the terms. It goes without saying that jurisdiction cannot be predicated upon vagueness.

There is no authority cited to overthrow the rule stated and discussed on pages 32 to 35 of the opening brief regarding the alleged security held upon real estate not constituting the doing of business. As shown in the opening brief the fact that credit may have been extended to the mortgagor or to the successor trustee who stepped into his shoes makes no difference in the rule.

It appears possible that there was one exception out of two hundred cars a year where the so-called "rollers" were shipped to defendant in Idaho not in care of any distributor. However, this car found its way into the hands of the distributor, Hogue, and the mere fact that

a shipper in Georgia consigned the car in that manner is of no significance, and binds nobody but him, and the argument in the opening brief concerning rollers found on pages 23 to 26, and the two United States Supreme Court cases therein cited are in no manner affected by that circumstance. No attempt is made to overthrow the authority or applicability of such cases.

Plaintiff appears to lay great stress upon the "very extensive" business done by defendant in Idaho. The size or volume has nothing to do with the character. If it is local it constitutes doing business even though it is small. If it is not local, but under interstate commerce with no merchandise warehoused in the state, no office maintained there, no goods purchased there, and if the solicitation is all for the purpose of making sales to be approved, sold and delivered in interstate commerce as the uncontroverted evidence in this case shows that it was, the volume of the business does not determine the local or interstate character and has nothing to do with the issue.

The argument is made in the plaintiff's brief that the evidence of defendant's officers is not worthy of belief because it is "strange," and that the manner of handling their business was a subterfuge to avoid the laws of the State of Idaho. Both are unsupported statements of conclusions. If defendant's officers did not speak the truth, plaintiff's remedy was to have the matter set for trial and establish the falsity of their statements. A motion for the summary judgment is not properly granted upon a presumption that the evidence of the party against whom it is granted is "strange" and therefore unworthy of belief, or that a subterfuge exists where there is no

irregular practice or evidence of an improper motive; but on the contrary, where the reasons for acting are perfectly normal and reasonable.

Commencing on page 37 of plaintiff's brief, considerable space is devoted to the proposition that C. H. Kinney was a representative of importance and a proper person upon whom to make service of process. It is not controverted that if defendant was doing business in Idaho he would have been a proper person to serve, but doing business in Idaho under the Idaho statute cited on pages 35 and 36 of the opening brief is a necessary element for service upon anybody. The dignity or importance to C. H. Kinney is not the issue.

There is nothing abnormal or unreasonable in the method of shipping roller cars into Idaho nor in the granting of extension upon payment of accounts receivable.

Commencing on page 40 of plaintiff's brief it is asserted that the use of the roller cars is a subterfuge, and that the charges made to the customers are fictitious charges, which if there were no original authority for the shipment, which is not shown, the shipment was at any rate ratified by acceptance of the rollers, and there appears to have been no complaint about payment for them nor any refusal to make payment, nor any evidence that payment was not made, so that such transaction can hardly be called fictitious. The reason given was a good reason, but even if not good, would not transform an interstate shipment into an intrastate shipment.

It may be conceded that under the laws of Idaho a non-resident may bring an action against a foreign cor-

poration upon a cause of action not arising in Idaho, and that jurisdiction in the state courts of Idaho could be acquired by attachment. Nevertheless, the United States courts possess only such jurisdiction as is conferred upon them by Congress, and because action might have been brought in the state court of Idaho by attachment does not indicate that it may be brought in the United States District Court for the District of Idaho.

Jurisdiction cannot be conferred by attachment in the United States courts. This was established by *Big Vein Coal Co. v. Read,* 229 U.S. 31, 37; 33 S. Ct. 694, 57 L. Ed. 1053, which says:

> "It was further held that an attachment was but an incident to a suit and unless the suit could be maintained the attachment must fall. In other words, in cases where the defendant could not be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment could not be had, as attachment was not a means of acquiring jurisdiction. . . .
>
> "The argument is that the right to issue an attachment under the act of 1872 should obtain, since the law now permits suit in the district of the residence either of the plaintiff or defendant, omitting the provision of the act of 1875 that the defendant could be sued only in the district in which he was an inhabitant or could be found at the time of commencing the proceeding. But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to

> personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court.''

The *Neirbo* case, contrary to plaintiff's statement, does not establish any ''broad'' rule. It holds that the privilege of objecting to improper venue is waived by appointment of an agent in the state upon whom process may be served in a case where the cause of action is to enjoin sale of property in the district. Neither of these elements is present in this case, and the rule of *Old Wayne Life Insurance Association,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 345, has not been abrogated, and still governs this case. The cases recited on page 43 which plaintiff says abrogates the rule, all involve situations where offices were maintained in the state. Furthermore, the *Old Wayne* case is a decision of the United States Supreme Court and cannot be overruled by lower Federal Courts nor by the Supreme Court of South Carolina. The limitations upon the scope of the *Neirbo* rule are found on pages 16 to 18 of the opening brief, and will not be here repeated.

The differences between the facts of this case and that of *Boise Flying Service v. General Motors Acc. Corp.,* 55 Ida. 5, 36 Pac. (2d) 813, has already been dis-

cussed, and the case of *Lipe v. Carolina C. & O. Ry. Co.*, 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248, is a case where the Railroad Company, defendant, was clearly doing business in the state. All that that case holds is that the state court has jurisdiction. As above indicated, that does not mean that the United States Court sitting in the state has jurisdiction if the privilege of objecting to the venue is asserted as it is here.

There can be no controversy concerning the proposition that if a foreign corporation maintains an office in a state it does business in the state, and must comply with the laws of that state, and is subject to suit therein. However, it has not been the law heretofore, and is not the law now that the solicitation of sales in interstate commerce by a jobber or manufacturer not having an office in the state and shipping all of its goods into the state constitutes doing business in the state into which the goods are shipped, nor has it been the law, nor is it now, that the shipment of goods on consignment alters the above rule, nor that the taking of security or the collection of accounts receivable constitutes the doing of business. If this court affirms the decision of the trial court, the above rule is altered, then Cummer-Graham Company and every corporation doing business in the normal manner in which Cummer-Graham Company did business, must qualify as a foreign corporation in every state in which their salesmen enter. This has not been the law heretofore, and is not the law now, and business methods have grown up in reliance upon this situation. Cummer-Graham Company, as the evidence shows, solicits orders and ships merchandise into twenty-six states in interstate commerce. The volume is not as large in

all states as in Idaho, but there cannot be one rule where the volume is large, and another rule where it is small. The *Neirbo* rule does not extend to cover this case and there is no reason why the rule should be so extended.

CONCLUSION

The brief of plaintiff does not comment on a single case cited by defendant nor does it overthrow any of the rules set forth in the opening brief, nor present any facts not recognized by the opening brief to exist, nor show why any of the cases cited in the opening brief are inapplicable.

The judgment of the trial court should be reversed.

Respectfully submitted,

GEORGE DONART,
Weiser, Idaho,

FREDERICK P. CRANSTON,
409 Equitable Bldg.,
Denver, Colorado,

Attorneys for Appellant.

No. 10287

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

No. 10287

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

CHARLES E. R. FULCHER, Esq.,
823 Title Guarantee Bldg.,
411 W. 5th Street
Los Angeles, Calif.

For Appellee United States Fidelity and Guaranty Company:

Messrs. MILLS & WOOD
EDWARD C. MILLS, Esq.,
811 C. C. Chapman Bldg.,
Los Angeles, Calif.

For Appellee California Fruit Growers Exchange:

Messrs. FARRAND & FARRAND,
ROSS C. FISHER, Esq.,
1028 Pacific Southwest Bldg.,
Los Angeles, Calif. [1*]

---

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California
Central Division

Civil No. 1447-H

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Defendants.

COMPLAINT ON FIDELITY BONDS

Comes now the plaintiff above named and for cause of action against the above named defendants, alleges as follows:

I.

At all times herein mentioned plaintiff California Fruit Growers Exchange was, and now is, a non-profit, cooperative, agricultural marketing corporation, organized and existing under the cooperative marketing laws of the State of California and with

its principal place of business in Los Angeles, Los Angeles County, California, and is a citizen of that state. [2]

II.

Defendant United States Fidelity and Guaranty Company at all times herein mentioned was, and now is, a corporation organized and existing under the laws of the State of Maryland and a citizen of that state, and duly authorized to do and doing business in the State of California and in the Southern District of California at Los Angeles, California. As a part of its said business said corporation was and is engaged in executing and becoming surety under fidelity bonds.

III.

The defendant Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 are of the persons whose names are signed to the said policy, a photostatic copy of which is annexed hereto and made a part hereof as exhibit "C". As plaintiff is informed and believes and therefore alleges, all of the said defendant Underwriting Members of Lloyd's are non-residents of the State of California and are residents of England and citizens of Great Britain.

IV.

Defendant Stanley Graham Beer is a resident of England and a citizen of Great Britain and is one of the Underwriting Members of Lloyd's in Lloyd's policy Number 52342, Exhibit "C" hereto. Because they are so numerous as to make it impracticable

to bring before the Court all of the said Underwriting Members of Lloyd's, the said Stanley Graham Beer is sued herein individually and as the representative of all of the said Underwriting Members of Lloyd's, who have likewise agreed with plaintiff that the said Stanley Graham Beer may be sued in an action upon the said Policy Number 52342 as the representative of all of them and that any [3] proceedings taken and any judgment rendered in such action will be binding for and against all of them in the same manner and to the same extent as if they were all individually named as parties defendant and appeared in the action.

V.

The matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of $3,000.00, and is the sum of $25,000.00.

VI.

On or about October 23, 1912 defendant United States Fidelity and Guaranty Company executed and delivered to plaintiff a primary fidelity bond or contract. Modifications of the said contract were made from time to time in writing by signed endorsements attached thereto. A copy of said bond or contract as modified is attached hereto as Exhibit "A" and made a part hereof by reference.

By the said primary fidelity bond or contract as so modified, defendant United States Fidelity and Guaranty Company guaranteed to pay to plaintiff

any pecuniary loss, including that for which plaintiff was responsible, occasioned by any acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or other criminal act of any of the employees of plaintiff listed thereunder, directly or through connivance, in any position and at any location in plaintiff's employ, and during the period commencing upon the date each such employee was listed thereunder and continuing until the termination of the suretyship as therein provided. Said primary fidelity bond or contract has ever since continued to be and now is in full force and effect. [4]

VII.

On November 1, 1936, at Los Angeles, California, plaintiff procured from the defendant Underwriting Members of Lloyd's, through Swett & Crawford, their duly authorized agents, excess fidelity blanket insurance in the amount of $25,000.00, the purpose and effect of which was to supplement the primary fidelity bond hereinabove referred to by extending the amount of the coverage over and above the maximum liability under the said primary bond, to and not exceeding the sum of $25,000.00. Said insurance was evidenced by a certificate of insurance, Number 6167, executed and delivered to plaintiff by said Swett & Crawford on behalf of said Underwriting Members of Lloyd's, at Los Angeles, California November 1, 1936. A photostatic copy of said certificate of insurance, together with the endorse-

ments pasted thereon, is annexed hereto as Exhibit "B" and made a part hereof. On January 26, 1937, pursuant to the said certificate of insurance the said defendant Underwriting Members of Lloyd's executed in London, under the seal of Lloyd's Policy Signing Office, and thereafter delivered to plaintiff in Los Angeles, through their said duly authorized agents, Swett & Crawford, the excess fidelity blanket policy of insurance contemplated and provided for by the said certificate of insurance. A photostatic copy of said excess fidelity blanket policy, together with the endorsements thereon is annexed hereto as Exhibit "C" and made a part hereof.

VIII.

On November 1, 1936 and during the period covered by said excess blanket fidelity insurance of defendant Underwriting Members of Lloyd's under said certificate and policy, Exhibits "B" and "C" hereto, one of plaintiff's employees, to-wit, Floyd E. Jones, was listed by plaintiff under the said primary fidelity bond, Exhibit "A" hereto, with a maximum liability as to the said [5] employee of $1,000.00 under said primary bond.

IX.

On November 1, 1937 and prior to the expiration of the Lloyd's excess blanket fidelity insurance hereinabove described, defendant United States Fidelity and Guaranty Company executed and delivered to plaintiff an excess commercial blanket bond No. 02-

308-37. On November 15, 1937 said excess commercial blanket bond was modified by three separate written riders executed by said defendant United States Fidelity and Guaranty Company and attached to the said excess commercial blanket bond No. 02-308-37. Said excess commercial blanket bond was also modified by written rider attached thereto and executed by said defendant United States Fidelity and Guaranty Company on January 12, 1938. A photostatic copy of the said excess commercial blanket bond and of the said riders modifying the same is annexed hereto as Exhibit "D" and made a part hereof by reference. The purpose and effect of said excess commercial blanket bond as so modified was to insure as therein provided, the fidelity of plaintiff's employees, including said Jones, in the maximum sum of $25,000.00 over and above the amount of the said primary bond, and to cover, among other things, as therein provided, any misconduct of such employees during the year 1937 for which a right of recovery against said defendant Underwriting Members of Lloyd's might be lost because of non-discovery and lapse of time.

X.

During the period that the acts of the said Jones were covered by the above described fidelity insurance he was employed by plaintiff as a loose fruit salesman. Among other duties as such salesman it was his duty to collect and account for to plaintiff the sale price of fruit sold by him. Said Jones did

during said [6] period collect and receive proceeds of sales of fruit sold by him and did account for portions of the money so received by him. But in various ways, as by making no record or by falsifying the records of such sales made by him and particularly by changing the record of the weight of fruit sold, said Jones was enabled to and did deceive plantiff as to the amount of fruit sold and the amount of money collected therefor from time to time, and thereby was enabled to and did fraudulently retain and convert to his own use part of the moneys received by him on such sales. Such misconduct of the said Jones began during the year 1937 after May 1, 1937, and continued thereafter from time to time during that year. The amount of such defalcations by the said Jones during the year 1937 prior to November 1, 1937 were in excess of $26,000.00.

XI.

On or about July 31, 1940 plaintiff discovered for the first time that said Floyd E. Jones might not have accounted for all of the moneys received by him on plaintiff's behalf for fruit sold by him, and immediately notified defendants of that fact in the manner provided in said contracts of insurance. Thereafter on or about August 15, 1940, as soon as the fact of such defalcations had been determined, plaintiff so notified defendants in writing. Because of the time required for investigation and audit to ascertain the facts and the extent of the defalcations of said Jones, defendants in writing extended the

time for filing proof of loss to November 15, 1940. Plaintiff began an investigation of the possible defalcations of the said Floyd E. Jones and through an audit by certified public accountants of all of his transactions as such loose fruit salesman, discovered on or about October 28, 1940, that during the year 1937, after May 1 and before November 1, said Jones, in his capacity of loose fruit salesman, had received [7] in payment for friut sold by him on behalf of plaintiff, and had converted to his own use and failed to account for to plaintiff sums aggregating in excess of $26,000.00.

XII.

On or before October 30, 1940 plaintiff in writing notified defendants of the nature and amount of the said defalcations of the said Jones during the year 1937 and filed with defendants affirmative proofs of loss, itemized and duly sworn to, including copies of the audit hereinabove mentioned.

XIII.

Plaintiff duly performed all of the conditions on its part to be performed under said primary and excess fidelity insurance contracts.

XIV.

On or about November 20, 1940 defendant United States Fidelity and Guaranty Company paid to plaintiff on account of the said defalcations of the said Floyd E. Jones during the year 1937 between

May 1 and November 1, the total sum of $1,000.00 as the maximum amount of coverage as to the said defalcations under the said primary fidelity bond.

XV.

Prior to the filing of this complaint defendant Underwriting Members of Lloyd's notified plaintiff that they would not pay plaintiff anything under the said excess blanket fidelity Policy Number 52342 on account of any defalcations of the said Floyd E. Jones for the alleged reason that liability for such defalcations rested upon defendant United States Fidelity and Guaranty Company under its said excess commercial blanket bond. [8]

XVI.

Prior to the filing of this complaint defendant United States Fidelity and Guaranty Company notified plaintiff that it would not pay to plaintiff anything in addition to the amount paid under its said primary fidelity bond, on account of the said defalcations of the said Floyd E. Jones during the year 1937, for the alleged reason that said defalcations were covered by the said Lloyd's excess blanket fidelity policy and were therefore not within the terms and conditions of said excess commercial blanket bond of United States Fidelity and Guaranty Company.

XVII.

By reason of the foregoing a controversy has arisen between plaintiff and the said defendants,

and between the said defendants themselves, as to whether liability to plaintiff for the said defalcations of the said Floyd E. Jones during the year 1937 as aforesaid between May 1 and November 1 rests upon the said defendant Underwriting Members of Lloyd's or upon the said defendant United States Fidelity and Guaranty Company. The defendant United States Fidelity and Guaranty Company contends that by the terms of its said excess commercial blanket bond it is not obligated to pay plaintiff for losses suffered by reason of any defalcations of plaintiff's employees for which plaintiff is entitled to be paid under the provisions of the said Lloyd's excess blanket fidelity policy; and said United States Fidelity and Guaranty Company further contends that the said defalcations in the year 1937 between May 1 and November 1 are covered by the said Lloyd's policy. Said defendant Underwriting Members of Lloyd's on the other hand contend that their said policy does not cover the said defalcations because of the following clause contained in said Lloyd's policy, to wit: [9]

> "5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance."

In this connection said defendant Underwriters contend that within the meaning of said quoted warranty there is no "discovery clause" in the said primary bond and that therefore their liability under the said warranty above quoted ceased with the "expiry date" of the said Lloyd's policy, to wit, November 1, 1937 noon, Pacific Standard Time.

Defendant United States Fidelity and Guaranty Company in this connection contends that the term "discovery clause" as used in the above quoted warranty was not intended to be and is not limited to a "specific clause" in the said primary bond providing for discovery but was intended to and does mean merely the period of time within which, under the said primary bond, losses must be discovered in order to be recoverable thereunder; that in the absence of specific limitation, there is no definite time limit for discovery under said primary bond.

XVIII.

Plaintiff takes no position upon the controversy hereinabove described except merely that under one or the other of said excess fidelity contracts hereinabove mentioned it is entitled to be paid for the losses suffered by reason of the said defalcations of the said Floyd E. Jones during the year 1937 between May 1 and November 1, up to the amount of $25,000.00, being the maximum amount [10] of excess liability under each of the said excess fidelity contracts.

Wherefore plaintiff prays that the court determine the controversy hereinabove set forth and whether defendant Underwriting Members of Lloyd's or the defendant United States Fidelity and Guaranty Company, is liable to plaintiff under their said respective excess fidelity contracts, and that the court thereupon render judgment in favor of the plaintiff and against the defendant or defendants so determined to be liable, in the sum of $25,000.00 with interest thereon at the rate of seven per cent per annum from October 30, 1940, together with costs and disbursements herein; and plaintiff further prays for all relief that may be just and proper.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
Attorneys for Plaintiff
215 West Sixth Street
Los Angeles, California. [11]

EXHIBIT "A"

603-12

United States Fidelity and Guaranty Company, Home Office: Baltimore, Md.

1 The United States Fidelity and Guaranty Company as Surety, for a premium
2 based upon an annual rate per one hundred dollars of suretyship, hereby guarantees to pay to
3 California Fruit Growers Exchange
4 the Employer, such pecuniary loss as the Em-

Exhibit "A"—(Continued)

ployer shall sustain (limited only by the provisos hereof)
of Money, Bonds, Debentures, Scrips, Certificates, Warrants, Transfers, Coupons, Bills of Exchange, Promissory Notes, Checks, Bank Notes, Currency Merchandise or Other Property,
including that for which Employer is responsible, occasioned by any act or acts of Fraud, Dishonesty,
Forgery, Theft, Larceny, Embezzlement, Wrongful Abstraction or Misapplication or Misappropriation or Other Criminal Act by any of the employes listed hereunder directly or through
connivance in any position and at any location in the Employer's employ, and during the period
commencing upon the date each is listed hereunder and continuing until the termination of this suretyship.

Provisos:

1. On application, other employes may be added hereto from time to time by the Surety issuing
an acceptance in writing, stating the amount and the date added, and this suretyship on any
employe may be increased or decreased by the Surety without impairing the continuity hereof, provided the Surety's aggregate liability under all

Exhibit "A"—(Continued)

its bonds and [12] engagements on any one employe shall
not exceed the largest bond or engagement on such employe.

2. In the event of recovery of any loss, or portion thereof, from other than suretyship, the Surety
and Employer shall share therein in the same proportion that their respective losses bear to the total loss.

3. The Employer shall deliver notice of any default hereof to the Surety at its Home Office
within ten days after the discovery of such default. All claims shall be submitted separately as
to each employe, showing the items and dates of the loses and delivered in writing to the Surety
at its Home Office within three months after their discovery. The Surety shall have two months
after claim has been presented in which to verify and pay same, during which time no legal
proceeding shall be brought against the Surety as to that claim, nor at all as to that claim after the
expiration of twelve months from its date.

4. This Suretyship as to any or all of the employes shall only terminate by:——

1. The Employer giving notice in writing to the Surety specifying the
date of termination.

Exhibit "A"—(Continued)

2. The Surety giving thirty days' notice in writing to the Employer.

(The Surety to refund unearned premium in the above cases.)

3. The non-payment of premium for a period of three months beyond date due; all premiums being due in advance.

Except that as to any employe, upon discovery of loss through that employe. [13]

In Testimony Whereof, the United States Fidelity and Guaranty Company has hereunto set its seal. Witness the hand of its President, attested by its Assistant Secretary, on this 23rd day of October, 1912.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
JOHN R. BLAND
President.

Attest:
[Seal]
WM. F. MORGAN
Assistant Secretary.

Endorsement

Baltimore, Md., December 19, 1913

The United States Fidelity & Guaranty Company as Surety under schedule bond #603-12, covering certain specified employees of the California Fruit Growers Exchange, hereby consents that its liability

Exhibit "A"—(Continued)

under said bond shall extend in addition to the California Fruit Growers Exchange to the California Fruit Exchange of Sacramento, California and W. H. Garvin of Delta, Colorado and Salt Lake City.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Seal] WM. F. MORGAN
Asst. Secretary.

Endorsement

The United States Fidelity and Guaranty Company hereby agrees to guarantee the fidelity of any party or parties in the amount and position applied for in favor of the California Fruit Growers Exchange for a term of thirty days, subject to all of the covenants and conditions set forth and expressed in the schedule bond No. 603-12, of said Company, dating in each instance from the date of their employment, and terminating otherwise than by limitation immediately on the issuance [14] of the properly executed acceptance notice upon receipt of application at the office of the United States Fidelity and Guaranty Company at Cleveland, Ohio, or on notice of declination.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] H. L. PRICE
Assistant Secretary.

November 6, 1915.

Exhibit "A"—(Continued)

Endorsement

The United States Fidelity & Guaranty Company as Surety under Schedule Bond #603-12, covering certain specified employes of the California Fruit Growers Exchange, hereby consents that its liability under said bond shall extend in addition to the California Fruit Growers Exchange to the Vegetable Growers Union, as interest may appear; subject to all the covenants and conditions set forth and expressed in said schedule bond heretofore issued.

UNITED STATES FIDELITY
& GUARANTY CO.

[Seal] J. N. RICHARDSON
Assistant Secretary.

November 2, 1917.

Counter signed:

UNITED STATES FIDELITY
& GUARANTY COMPANY

By CARL E. ENNIS
Attorney in fact.

Endorsement

It is understood and agreed that this bond shall be extended to cover the interest of Blessing Electric and Manufacturing Company as its interest may appear. All loss hereunder shall be adjusted with and payable to California Fruit Growers Exchange.

Attached to and *form* a part of Schedule Bond S-603-12 California Fruit Growers Exchange

Exhibit "A"—(Continued)

Dated at Los Angeles, California, November 30th, 1921. [15]

UNITED STATES FIDELITY
& GUARANTY COMPANY

[Seal] By J. ST. PAUL WHITE
Its Attorney in Fact.

Endorsement

California Fruit Growers Exchange—S-603-12

It is understood and agreed that Paragraph #2 (line 17 and 18) of the bond to which this rider is attached shall be eliminated and the following substituted in lieu thereof.

In the event that the loss of the employer on any one employe exceeds the amount of insurance on said employe, the Surety shall not be entitled to participate in any salvage on account of said employee until the employer is fully reimbursed.

Attached to and forming a part of United States Fidelity & Guaranty Company schedule bond S-602-12, dated October 23rd, 1912.

UNITED STATES FIDELITY
& GUARANTY COMPANY

[Seal] E. A. CASEBEER
Attorney-in-Fact.

Endorsement

The United States Fidelity & Guaranty Company, hereby agrees to assume liability without notice, on any employe, new or old, occupying, either permanently or temporarily, any position shown in the

Exhibit "A"—(Continued)

schedule or added thereto, in the amount set opposite said position, for the first ninety (90) days of occupancy, which coverage is to terminate by the expiration of the ninety (90) day period, or upon receipt of application and the Insurer executing its written acceptance adding such employe.

The insurer agrees to assume liability without notice, on any employe, new or old, occupying any new position created, other than those indicated in schedule list or added thereto, in the sum of Ten Thousand ($10,000.00) Dollars, for the first ninety (90) days of [16] occupancy following its creation, which coverage is to terminate by the expiration of the ninety day period, or upon receipt of application and the Insurer executing its written acceptance adding such employe.

Attached to and forming part of Schedule Fidelity Bond dated October 23rd, 1912, executed by United States Fidelity & Guaranty Company as Surety, in favor of California Fruit Growers Exchange, said Bond being numbered 603-12.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By J. ST. PAUL WHITE
Attorney-in-Fact.

Dated at Los Angeles, Calif.—May 23, 1925.

Exhibit "A"—(Continued)

Rider to Be Attached to and Form a Part of
Fidelity Bond No. 4-03-62-12
Issued by
United States Fidelity and Guaranty Company
and in favor of

California Fruit Growers Exchange and/or Blessing Electric & Manufacturing Company and/or California Fruit Exchange of Sacramento and/or The Exchange Orange Products Company and/or Exchange Lemon Products Company as their interests may appear.

The provisions of the bond to which this Rider is attached are hereby amended to the effect that all notices of claim and statements of loss and all other negotiations with the Surety regarding any matter arising under said bond shall be forwarded to or had with the Surety's Branch Office at Los Angeles, California, instead of the Surety's Home Office at Baltimore, Maryland.

This Rider shall be effective from and after the date hereof.

Signed, sealed and dated this 6th day of February, 1930.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Seal] By J. ST. PAUL WHITE
Attorney-in-Fact. [17]

Exhibit "A"—(Continued)

Endorsement

It is hereby understood and agreed that, notwithstanding any provision to the contrary of the bond to which this rider is attached, the surety will not claim salvage nor will it require the employer to apply as salvage or in reduction of any loss or claim under said bond, any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account of the insurance plan for employees known as the Sunkist Provident Plan; that insofar as the rights of the surety under said bond are concerned no claim for loss arising under said bond shall in any way be reduced or otherwise affected by the operation or existence of the said Sunkist Provident Plan, or any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account thereof.

Attached to and forming part of fidelity schedule bond #4-03-62-12, of United States Fidelity and Guaranty Company, as Surety, in favor of California Fruit Growers Exchange, et al, as Employer, dated November 1st, 1912.

Dated at Los Angeles, California, this 15th day of May, 1930.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Seal] By J. ST. PAUL WHITE
Attorney-in-Fact.

Exhibit "A"—(Continued)

State of California
County of Los Angeles—ss.

On this Fifteenth day of May in the year one thousand nine hundred and Thirty, before me, H. M. Beck, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. St. Paul White, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said J. St. Paul White duly acknowledged to me that he subscribed the name of the United States [18] Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] H. M. BECK.
Notary Public in and for Los Angeles County, State of California.

Endorsement

The United States Fidelity and Guaranty Company, as Surety under Fidelity Schedule Bond #4-03-62-12 issued effective the 1st day of November, 1912, in favor California Fruit Growers Exchange, et al hereby amends said bond by the addition of the following clause:

Exhibit "A"—(Continued)

"In case a loss is alleged to have been caused by the fraud or dishonesty of one or more of a group of Employees, all of whom are covered under the attached bond, and the Employer shall be unable to designate the specific employee or employees causing such loss, the Employer shall nevertheless have the benefit of the attached bond, provided that the evidence submitted reasonably establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees of the said group, and provided further that the liability of the Surety for any such loss shall not exceed in the aggregate, the average of the respective amounts of suretyship set opposite the names of the Employes of said group."

This amendment to be effective the 20th day of August, 1931, and subject to all other terms and conditions of said bond not inconsistent therewith.

Signed, Sealed and Dated this 20th day of August, 1931.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Seal] WM. A. SEHLHORST
Assistant Secretary.

Accepted By:——

CALIFORNIA FRUIT GROWERS EXCHANGE, et al

B. B. GREGORY. [19]

Exhibit "A"—(Continued)

Rider

The United States Fidelity and Guaranty Company, as Surety under Fidelity Schedule Bond No. 14815-03-62-12 issued effective the 1st day of November, 1912 in favor of California Fruit Growers Exchange, et al hereby amends said bond as follows:

1. By substituting the word "fifteen" for the word "ten" in line numbered 20.

2. By substituting the word "fifteen" for the word "twelve" in line numbered 25.

The attached bond shall be subject to all its terms, conditions and limitations except as herein expressly modified.

This rider shall be effective as of the 10th day of December, 1940.

Signed, sealed and dated this 10th day of December, 1940.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Seal] J. ST. PAUL WHITE
Attorney-in-Fact.

Accepted By:

CALIFORNIA FRUIT GROWERS EXCHANGE for itself and all others named as Insured in this bond.

By R. S. HAYSLIP. [20]

EXHIBIT "B"

No. 6167

CERTIFICATE OF INSURANCE

This is to Certify that the undersigned have procured insurance as hereinafter specified from

UNDERWRITER'S AT LLOYD'S, London Through Swett & Crawford, 100 Sansome Street, San Francisco, California, and Sedgwick, Collins & Company, Ltd., 7 Gracechurch Street, London, E. C. 3. Subject to the terms and conditions of Lloyd's Excess Fidelity Blanket—(M.W.D. American Form) Policy in favor of California Fruit Growers Exchange address: Los Angeles, California in the amount of Twenty-Five Thousand and no/100 Dollars during the period commencing with the 1st of November, 1936 and ending with the 1st of November, 1937, both days at noon on Excess Blanket Fidelity in the amount of $25,000.00 over and above Primary Limit of approximately $972,000.00 on United States Fidelity and Guaranty Company Bond No. 14815-03-62-12.

Amount	Rate	Premium
$25,000.—		$901.00
3% State Tax		$ 27.03
Policy Fee		$ .25
		$928.28

It is specifically understood that the names of the insurers hereunder are on file in the office of

Sedgwick, Collins & Co., Ltd., 7 Gracechurch Street, London, E. C. 3, and will be one file in the office of Swett & Crawford, upon being forwarded to them by Sedgwick, Collins & Co., Ltd.

Loss or damage to the property insured occasioned by war, invasion, hostilities, acts of foreign enemies, civil war, rebellion, insurrection, military or usurped power or martial law or confiscation by order of any Government or public authority not covered.

Insurance may be cancelled at any time by Swett & Crawford, by sending by mail to last known address of Assured five days' written notice of their desire to cancel the same.

It is understood that "noon" refers to standard time at the place of location of risks assured.

This document is intended for use as evidence that insurance described above has been effected, against which underwriters' certificate or policy will be duly issued and conditions of policy issued by Underwriters to supersede conditions on this certificate. Immediate advice must be given of any discrepancies, inaccuracies or necessary changes. Original

Dated at Los Angeles U.S.A., this 1st of November, 1936

SWETT & CRAWFORD,
By J. C. SPENCER
V P [21]

Excess Fidelity Blanket—
(M. W. D. American Form)

1. This Policy is to indemnify the Assured against all such direct loss as the Assured may sustain by reason of the dishonesty of any employees in their employment who are bonded under a Bond or Bonds (hereinafter called Primary Bonds) issued by an approved Insurance Company, subject to the Conditions hereinafter contained.

2. It is understood and agreed that such employees are bonded under the aforesaid Primary Bonds for a total aggregate amount of approximately $972,000.00 and that this policy of Excess Insurance only covers such portion of the ultimate net loss sustained by the Assured in respect of defalcations committed by any such employee subsequent to the 1st day of November, 1935 as shall be in excess of the amount for which such employee is bonded under the said Primary Bonds, provided always that Underwriters' liability in respect of any number of losses shall in no event exceed the sum of $25,000.00 in the aggregate.

3. It is a condition of this Policy that the Assured shall not reduce the amount for which any employee is bonded under the said Primary Bonds without the consent of the Underwriters hereto; that employees engaged or promoted to fill the positions held by employees leaving the employment of the Assured shall be bonded for the same

amounts as their predecessors, and that any new employee additional to the total number employed at the inception of this Policy shall be bonded for a sum not less than the amount for which other employees engaged in the same class or grade of employment are bonded.

4. It is further understood and agreed that this excess insurance is subject to all the terms and conditions of the said Primary Bonds insofar as the same do not conflict with the terms and conditions herein contained, and it is a condition of this Policy that in event of the Underwriters acting as Surety under the said Primary Bonds withdrawing or cancelling their guarantee in respect of any of the employees for any reason the Underwriters hereto shall be automatically relieved of their obligations hereby undertaken as regards the acts of any such employee or employees subsequent to the date of such withdrawal or cancellation.

5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance.

6. This Policy is subject to the same cancelling clause as that appearing in the said Primary Bonds.

7. This Insurance shall automatically embrace any employee bonded under the Primary Bonds, the Assured undertaking to render on expiry hereof a return of additions and cancellations occurring during the currency of this Policy whereupon the premium shall be adjusted at Forty (40) per cent of the Primary Premium.

Attached to and made part of Certificate No. 6167.

Dated November 1st, 1936.

SWETT & CRAWFORD
By J. C. SPENCER
V P [22]

Endorsement

It is understood and agreed that Paragraph No. 3 is amended to read as follows:

It is a condition of this policy that the Assured shall not reduce the amount for which any position is covered under the said Primary Bond without the consent of the Underwriters hereto. It being understood and permitted that the Assured may reduce the Bond on any employee when he is transferred to a position covered in a smaller amount; that employees engaged or promoted to fill the positions held by employees leaving the employment of the Assured shall be bonded for the same amounts as their predecessors, and that any new employee additional to the total number employed

at the inception of this Policy shall be bonded for a sum not less than the amount for which other employees engaged in the same class or grade of employment are bonded. It being understood and permitted that the Assured may regulate the amounts of bonds at locations according to the volume of business transacted.

All Other Terms and Conditions Remaining Unchanged.

Attached to and forming part of Certificate No. 6167 of Underwriters at Lloyd's, London

Issued to California Fruit Growers Exchange

Dated November 1st, 1936.

SWETT & CRAWFORD
By J. C. SPENCER
V P

Endorsement

It is hereby understood and agreed that, notwithstanding any provision to the contrary of the policy to which this rider is attached, the Underwriters will not claim salvage nor will they require the employer to apply as salvage or in reduction of any loss or claim under this policy, any payments of premium or of income, dividends, loan preceeds, cash values, interest, or any other moneys accruing or received, on account of the insurance plan for employees, known as the Sunkist Provident Plan: that insofar as the rights of the Underwriters under this policy are concerned, no claim

for loss arising under this policy shall in any way be reduced or otherwise affected by the operation or existence of the said Sunkist Provident Plan, or any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account thereof.

All Other Terms and Conditions Remaining Unchanged.

Attached to and forming part of Certificate No. 6167 of Underwriters at Lloyd's, London

Issued to California Fruit Growers Exchange.

Dated November 1st, 1936.

SWETT & CRAWFORD
By J. C. SPENCER
V P [23]

Endorsement

Notwithstanding Anything Contained Herein to the contrary it is hereby understood and agreed that the name of the Assured shall read:—

California Fruit Growers Exchange and/or
Blessing Electric & Manufacturing Company and/or
California Fruit Exchange of Sacramento and/or
The Exchange Orange Products Company and/or
Exchange Lemon Products Company
as their interests may appear.

All Other Terms and Conditions Remaining Unchanged.

Attached to and forming part of Certificate No. 6167 of Underwriters at Lloyd's, London

Issued to California Fruit Growers Exchange

Dated November 1st, 1936

SWETT & CRAWFORD
By J. C. SPENCER
V P

Endorsement

It is understood and agreed that loss hereunder, if any, shall be adjustable with, recoverable by and payable to—

California Fruit Growers Exchange

and any notice or other communication required by this Policy or in connection therewith shall be deemed sufficient if sent by or received by California Fruit Growers Exchange, as the case may be.

All Other Terms and Conditions Remaining Unchanged.

Attached to and forming part of Certificate No. 6167 of Underwriters at Lloyd's, London

Issued to California Fruit Growers Exchange

Dated November 1st, 1936

SWETT & CRAWFORD
By J. C. SPENCER
V P [24]

EXHIBIT "C"

J 3099 * 10 Feb 1937

Form approved by Lloyd's Underwriters' Fire and Non-Marine Association.

(Cut)

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

£ U.S. $25,000

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognized by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and for Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

LLOYD'S POLICY.

(Cut)

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

Whereas California Fruit Growers Exchange and/or Blessing Electric & Manufacturing Company and/or California Fruit Exchange of Sacramento and/or The Exchange Orange Products

Company and/or Exchange Lemon Products Company as their interests may appear, of Los Angeles, California, (hereinafter called "the Assured"), have paid Nine Hundred and One Dollars Premium or Consideration to Us, who have hereunto subscribed our Names to Insure against Loss as follows, viz.:—Excess Blanket Fidelity, as set forth in the wording attached hereto, which is to be taken and read as part of this policy.

Premium hereon calculated at 40% of Primary Premium during the period commencing with the 1st of November, 1936 and ending with the 1st of November, 1937, both days at noon Local Standard Time.

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now know Ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not for Another, our Heirs, Executors, and Administrators, to pay or make good to the Assured or to the Assured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of Twenty-five Thousand Dollars such payment to be made within Seven Days after such Loss is proved and that in proportion to the several Sums by each

of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In Witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us insured.

Dated in London, the 26th Day of January, One Thousand Nine Hundred and Thirty-seven.

[Seal] [26]

Excess Fidelity Blanket

1. This Policy is to indemnify the Assured against all such direct loss as the Assured may sustain by reason of the dishonesty of any employees in their employment who are bonded under a Bond or Bonds (hereinafter called "Primary Bonds") issued by an approved Insurance Company, subject to the Conditions hereinafter contained.

2. It is understood and agreed that such employees are bonded under the aforesaid Primary Bonds for a total aggregate amount of approximately $972,000 and that this Policy of Excess Insurance only covers such portion of the ultimate net loss sustained by the Assured in respect of defalcations committed by any such employee subsequent to the 1st day of November 1935 as shall be in excess of the amount for which such employee is bonded under the said Primary Bonds, provided always that Underwriters' liability in respect of any number of losses shall in no event exceed the sum of $25,000 in the aggregate.

3. It is a condition of this Policy that the Assured shall not reduce the amount for which any position is covered under the said Primary Bond without the consent of the Underwriters hereto. It being understood and permitted that the Assured may reduce the Bond on any employee when he is transferred to a position covered in a smaller amount: that employees engaged or promoted to fill the positions held by employees leaving the employment of the Assured shall be bonded for the same amounts as their predecessors, and that any new employee additional to the total number employed at the inception of this Policy shall be bonded for a sum not less than the amount for which other employees engaged in the same class or grade of employment are bonded. It being understood and permitted that the Assured may regulate the amounts of bonds at locations according to the volume of business transacted.

4. It is further understood and agreed that this excess insurance is subject to all the terms and conditions of the said Primary Bonds insofar as the same do not conflict with the terms and conditions herein contained, and it is a condition of this Policy that in event of the Underwriters acting as Surety under the said Primary Bonds withdrawing or cancelling their guarantee in respect of any of the employees for any reason the Underwriters hereto shall be automatically relieved of their obligations hereby undertaken as regards

the acts of any such employee or employees subsequent to the date of such withdrawal or cancellation.

5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance.

6. This Policy shall be cancelled at any time at the request of the Assured, or by the Underwriters by giving 10 days' notice of such cancellation.

If this Policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this Policy or last renewal, the Underwriters retaining the customary short rate, except when this Policy is cancelled by the Underwriters giving notice they shall retain only pro rata premium. [27]

7. This Insurance shall automatically embrace any employee bonded under the Primary Bonds, the Assured undertaking to render on expiry hereof a return of additions and cancellations occurring during the currency of this Policy whereupon the premium shall be adjusted at Forty per cent of the Primary Premium.

8. It is understood and agreed that loss hereunder, if any, shall be adjustable with, recoverable by and payable to—

California Fruit Growers Exchange

and any notice or other communication required by this Policy or in connection therewith shall be deemed sufficient if sent by or received by California Fruit Growers Exchange, as the case may be.

9. It is hereby understood and agreed that, notwithstanding any provision to the contrary of this Policy the Underwriters will not claim salvage nor will they require the employer to apply as salvage or in reduction of any loss or claim under this Policy, any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other monies accruing or received, on account of the insurance plan for employees, known as the Sunkist Provident Plan: that insofar as the rights of the Underwriters under this Policy are concerned, no claim for loss arising under this Policy shall in any way be reduced or otherwise affected by the operation or existence of the said Sunkist Provident Plan, or any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other monies accruing or received on account thereof.

Attaching to and forming part of Lloyd's Policy No. 52342.

Service of Suit Clause:

It is agreed that in the event of dispute as to the validity of any claim made by the Assured under

this policy of insurance, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of the Courts of the United States of America and will comply with all legal requirements necessary to give such Courts jurisdiction, and that in any suit instituted by the Assured against any one of them upon this Contract, Underwriters hereon will abide by the ultimate decision of such Courts and settle accordingly.

All other terms and conditions remaining unchanged.

This slip is attached to and made a part of Policy No. 52342 of Underwriters at Lloyd's, London.

Los Angeles, California. November 1st, 1936.

Issued to California Fruit Growers Exchange.

SWETT & CRAWFORD

By [Signatures Illegible.] [28]

Hartley, Cooper & Co. Ltd., Agents

F. R. Bussell	3/30ths	40%
W. S. Smith	1/30th	
T. A. Walker	2/30ths	
S. G. Beer	2/30ths	
A. D'Ambrumenil	2/30ths	
C. D. Brill	1/30th	
C. B. Levita	1/30th	
W. Cooper	1/30th	
F. D. Purtwell	1/30th	
[illegible] Montafiore	1/30th	
E. Devers	1/30th	
A. H. Dancey	1/30th	
F. A. White	1/30th	
F. E. Wilhart	1/30th	
F. S. Alexander	1/30th	
J. Devers	1/30th	
Inverforth	1/30th	
W. Murray	1/30th	
G. A. Duveell	1/30th	
F. W. Lent	1/30th	
G. Ingram Johnson	1/30th	
F. M. [illegible]	1/30th	
S. J. [illegible] Hudson	1/30th	
H. McK[illegible]	1/30th	
F. A. White	1/7th	6%
F. D. Purtwell	1/7th	
F. R. Bussell	1/7th	
[illegible] Steffore	1/7th	
H. S. Bas[illegible]	1/7th	
E. Devers	1/7th	
S. G. Beer	1/7th	
A. H. Dancey	1/5th	4%
W. Cooper	3/5ths	
F. R. Bussell	1/5th	

16·46

F. Bolton & Co. Ltd., Agents

L. A. Clatworthy	1/10th	10%
A. C. Grover	1/10th	
G. Mack Hamper	1/10th	
G. J. Fell	1/10th	
V. L. Evans	1/10th	
J. W. D. Mellor	1/10th	
F. B. D. Ward	1/10th	
J. H. Buxton	1/10th	
F. Oliviant	1/10th	
J. H. Glover	1/10th	

John Poole & Sons Ld., Agents

Alice H. Poole	2/27ths	of 60%
S. Thompson	1/27th	
W. H. Campbell	1/27th	
H. R. Yorke	1/27th	
P. O. Harrison	1/27th	
R. L. Kennedy	1/27th	
D. B. Thorp	1/27th	
D. D. Goldingham	2/27ths	
G. S. Thompson	1/27th	
H. V. Cochrane	2/27ths	
R. S. Fenn	1/27th	
R. R. Campbell	1/27th	
I. D. Campbell	1/27th	
O. B. S. Poole	1/27th	
A. W. F. Lyon Clark	1/27th	
E. S. W. Cattley	1/27th	
Basil Sanderson	1/27th	
H. A. Northen	1/27th	
Magnus Goodfellow	1/27th	
W. P. W. Holland	1/27th	
L. Franks	1/27th	
J. McK. Campbell	1/27th	
C. M. Newns	1/27th	
A. H. W. Picton	1/27th	

J. S. Rowe, Agent

J. Stanley Rowe	3/32nds	of 40%
P. G. Yorke	3/32nds	
J. M. Beattie	1/8th	
W. K. Findlay	1/8th	
A. Beattie	3/32nds	
B. L. Glover	3/32nds	
S. Millard	1/8th	
K. W. Stone	1/16th	
B. Cooke	3/16ths	

28%

W. S. McBride	8/27ths	12%
William Marshbank	3/27ths	
D. Stonehouse	3/27ths	
C. F. Etheridge	2/27ths	
J. A. Leighton	3/27ths	
E. W. Payne	2/27ths	
B. E. Tozer	2/27ths	
P. W. Harding	2/27ths	
F. N. Scroop	2/27ths	

PER F. R. Bussell 878 (1937)

(37)

A. B. Dick-Cleland & Son, Agents

R. B. Pipon	[illegible]
G. W. H. Goyden	1/153rd
M. Glynn	2/153rds
J. P. Phillips	1/153rd
I. Silverwood	2/153rds
T. O. Davis	1/153rd
R. B. V. Casey	2/153rds
H. W. W. Hodgell	2/153rds
M. D. Barder	1/153rd
P. M. Ridout	2/153rds
A. D. Vickers	3/153rds
B. B. Price	2/153rds
A. B. Dale	2/153rds
F. W. Clark	2/153rds
A. B. Dick Cleland	3/153rds
R. B. Holman	3/153rds
P. W. Gardner	2/153rds
L. B. Cox	3/153rds
L. M. James	2/153rds
C. Mitchell	3/153rds
M. D. Rogerson	2/153rds
D. Watson	5/153rds
A. E. Lawrence	5/153rds
J. Walter Rowland	3/153rds
J. W. Ward	5/153rds
R. W. H. O'Neill	3/153rds
B. F. Eyston	2/153rds
J. W. A. Geere	1/153rd
F. M. W. Carlisle	3/153rds
D. L. Peel	3/153rds
J. R. Horlick	3/153rds
P. I. Jacobsen	3/153rds
H. B. Hawes	6/153rds
F. W. Rushbrooke	3/153rds
H. D. Jacobsen	3/153rds
W. Turner	3/153rds
B. B. Asbey	3/153rds
J. P. Rant	3/153rds
C. B. Davis	3/153rds
H. B. Broom	3/153rds
H. R. Davis	3/153rds
B. W. Martin	3/153rds
D. A. Whitworth	3/153rds
E. H. R. Thackwell	3/153rds
E. B. Porter	2/153rds
C. B. Gilroy	2/153rds

L. F. Stuart, Agent

Sayill, Bough May & Co., Agents

C. D. E. Hay	2/153rds
B. T. Todd	2/153rds
E. C. Dorman	4/153rds
L. A. Redman	4/153rds
R. F. B. Aldrich-Blake	4/153rds
B. G. Suter	2/153rds
J. Hamer	2/153rds
T. E. Morel	2/153rds
C. D. Peachey	2/153rds
D. B. Redman	2/153rds
J. E. Vaughan Morgan	2/153rds
A. J. A. Wallace Barr	2/153rds
H. W. E. Wortner	2/153rds

C1115

Bambor Brothers Ltd., Agents

B. A. Forster	2/153rds
J. B. B. Dugdale	2/153rds
W. T. Scott Elliot	2/153rds

5·35

645 (1937)

PER C. B. Dick-Cleland

(37)

A. B. Dick-Cleland & Son, Agents

J. K. Dick-Cleland	4/119ths
A. B. Dick-Cleland	6/119ths
P. O. Daves	3/119ths
P. Fairweather	4/119ths
M. D. Barder	3/119ths
J. P. Phillips	3/119ths
M. Moses	3/119ths
N. B. V. Casey	3/119ths
R. A. C. Harding	3/119ths
G. W. N. Boynston	3/119ths
R. H. Pipon	3/119ths
J. C. Quinnell	3/119ths
B. G. Whiteley	3/119ths
D. E. Macintosh	3/119ths
B. F. L[illegible]	3/119ths
E. T. L[illegible]	2/119ths
G. U. [illegible]	3/119ths
A. G. P[illegible]	3/119ths
W. [illegible]	2/119ths
A. S. [illegible]	2/119ths
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	3/119ths
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	3/119ths
[illegible]	3/119ths
J. W. A. Clare	2/119ths
A. H. [illegible]	3/119ths
G. E. [illegible]	2/119ths
F. H[illegible]	2/119ths
W. S. [illegible]	2/119ths
R. C. Hardman	2/119ths
D. O. Thornton	3/119ths
B. F. Blackwell	3/119ths
T. R. Shepherd-Cross	3/119ths
H. Harrison	4/119ths

4·01

643 (1937)

PER C. B. Dick-Cleland

(37)

P. Wigham Richardson & Co. Ltd.

P. Wigham Richardson	4/37ths
W. H. Cumming	4/37ths
A. Stott	3/37ths
R. D. Denman	3/37ths
Denman	[illegible]
J. Purves-Stewart	[illegible]
F. Samuel	[illegible]
E. F. Walker	[illegible]
R. S. Walker	[illegible]
G. S. Goldberg	3/37ths
W. H. B. Everett	2/37ths
R. L. Kiln	3/37ths

1·34

644 (1937)

PER C. B. Dick-Cleland

J. R. Rooper	1/30th
Thomas Forbes	1/30th
T. L. Forbes	2/30ths
W. C. Feeney	2/30ths
F. D. Bacon	3/30ths
C. F. Blakell	1/30th
S. H. Feeney	1/30th
L. G. Howe	2/30ths
J. G. Forbes	1/30th
A. Cuthbert	1/30th
Henry Forbes	1/30th
S. H. Symons	1/30th
W. A. Cantlay	1/30th
A. W. Emery	1/30th
J. H. Ballantyne	1/30th
R. F. A. Fresco	1/30th
D. G. Fitt	1/30th
B. T. Thompson	1/30th
F. C. Wright	4/30ths
F. V. Enthoven	1/30th
H. G. Beck	1/30th
H. G. Howe	1/30th

12·35

47 (1937)

PER J. M. Ballantyne

6/63

H. Babington Hill	3/46ths	PER
H. B. Hill, Junr.	3/46th	
Horace R. Hill	2/46ths	
J. D. Stobart	2/46ths	
W. G. W. Radford	1/46th	
A. R. Athey	1/46th	
F. R. Bromley	2/46ths	
Lever and Melville	1/46th	
E. M. Nightingale	1/46th	
A. V. Reiner	2/46ths	
W. C. Harrild	1/46th	
A. G. Dalgety	1/46th	
J. M. Kenward	1/46th	
F. K. Bromley	1/46th	
J. G. Westray	1/46th	
A. S. Butler	1/46th	
N. D. Charrington	1/46th	
Harold Bristow	1/46th	
C. F. Reiner	1/46th	
J. S. S. Litchfield-Speer	1/46th	
F. K. Hodgson	1/46th	
E. T. S. Dugdale	1/46th	
R. Core	1/46th	
W. Copping	1/46th	
R. L. Thompson	1/46th	
G. H. Kennedy	3/138ths	
W. A. Hugging	2/46ths	
H. F. Elliott	2/46th	
R. K. D. Renton	1/46th	
E. Geoffrey Toye	2/46ths	
J. M. Whittall	2/46ths	
P. W. O. Liddell	1/46th	
J. R. Bryans	1/46th	
M. C. Bryans	1/46th	
A. F. Proctor	1/46th	
H. S. Egerton	1/46th	773 (1937)

M. BABINGTON HILL AGENT

6·77

H B Hill

(10) R. V. Hood	1/5th	PER
E. E. St. Quintin	1/5th	
L. E. St. Quintin	1/5th	
H. Gore-Brown	1/10th	
T. A. Tatton	1/10th	
E. Hughes Hughes	1/10th	
D. E. Mackintosh	1/10th	777 (1937)

1·42

H B Hill

[illegible] M. Allen	1/11th	PER
H. Allen	1/11th	
[illegible] F. Brockholes	1/11th	
[illegible] A. C. Wilkinson	1/11th	
[illegible] S. S. Harding	1/11th	
W. J. French	3/11ths	
[illegible] Fremantle	1/11th	
[illegible] Wilkinson	1/11th	
[illegible] Allen	1/11th	775 (1937)

2·1

H B Hill

M. P. Henderson	1/46th	PER
D. E. C. Price	1/45th	
A. E. Roberts	2/46ths	
C. H. Roberts	1/45th	
P. E. L. Roberts	1/45th	
Rhayader	1/45th	
C. A. M. Barlow	1/45th	
G. de H. Vaizey	1/45th	
Reginald Abel Smith	1/45th	
Vivian A. Powell	1/45th	
R. Owen Williams	1/45th	
Owen H. Smith	1/45th	
W. N. D. Drury	1/45th	
S. G. L. Cator	1/45th	
L. W. A. Chappell	1/45th	
[illegible] J. Malcolm	1/45th	
H. P. Chago	1/45th	
Rodney A. Price	1/45th	
[illegible] W. Whitelaw Bennett	1/45th	
A. H. Cleaver	1/45th	
L. A. Lobb	1/45th	
M. L. Jacobs	1/45th	
J. M. [illegible] Vaizey	1/45th	
Robert L. H. Lender	1/45th	
Alistair E. Ferguson	2/46ths	
C. L. Mackean	1/45th	
J. W. Pile	1/45th	
W. [illegible] Vicar	1/45th	
W. E. [illegible] Oman	1/45th	
C. L. Ludd	1/45th	
L. [illegible] Canfield	2/45ths	
L. A. Ward	1/45th	
J. Hetherington	1/45th	
[illegible] A. Monkefield	1/45th	
De. Bambey	1/45th	
J. Neal	1/45th	
D. J. Cambden	1/45th	
F. E. Fedr	1/45th	
D. N. Broad	1/45th	
E. O. Hunt	1/45th	
W. J. Dos	1/45th	
W. D. Denyer	1/45th	000

BEVINGTON, VAIZEY & FOSTER LTD., Agents

8·23

W. S. Graham

C. V. Sinclair	1/18th	PER
S. A. J. Cole	1/18th	
R. C. V. Holloway	1/18th	
W. E. Taney	1/18th	
Henry Bradford	1/18th	
J. L. Tagg	1/18th	
J. A. Lynch	1/18th	
P. R. MacKinnon	1/18th	
H. B. Taylor	1/18th	
C. S. Taylor	1/18th	
R. D. King	1/18th	
J. R. Bridgman	3/18ths	
Arthur D. Bradford	3/18ths	991 (1937)

A. D. BRADFORD, Agent

4·12

W. S. Graham

369 27/1/36

Asheton Pownall	1/22nd	
E. B. Graham	1/22nd	
Gustav Besley	1/22nd	
T. Hammond Wells	1/22nd	
C. Kenneth Murchison	1/22nd	
Kenneth G. Poland	1/22nd	
Albert V. F. Seymour	1/22nd	
R. Holdsworth Williams	1/22nd	
W. Frederick Williams	1/22nd	
Robert Lynch White	1/22nd	
J. H. Dundas-Grant	3/88ths	of 3/4ths
F. E. Richards	1/22nd	
W. P. Wild	5/88ths	
P. H. B. Woodhouse	1/22nd	
P. H. Peskett	1/22nd	
G. McKechnie	1/22nd	
J. E. Newton	1/22nd	
J. W. S. Greenlees	1/22nd	
I. R. Facon	1/22nd	
A. H. C. Sutherland	1/22nd	
[illegible] H. Williams	1/22nd	
W. D. Williams	1/22nd	
Asheton Pownall	1/7th	
Gustav Besley	1/7th	
T. Hammond Wells	1/7th	
Albert V. F. Seymour	2/7ths	
R. Holdsworth Williams	1/7th	of 1/4th
W. Frederick Williams	1/7th	
W. P. Wild	1/7th	
P. H. Peskett	1/7th	
C. Kenneth Murchison	1/14th	782 (1937)

6·17

PER

Σ. B Graham

L. P. Langton	9/124ths	PER
H. C. Back	1/31st	
R. H. Coachman	3/124ths	
E. G. Dance	1/31st	
J. C. Dance	1/31st	
W. J. Evans	1/31st	
H. Goring	3/62nds	
A. R. Harvey	1/31st	
J. T. Kemp	1/31st	
G. A. Nelson	1/31st	
J. Orr Ewing	1/31st	
A. G. Robertson	1/31st	
R. Shuttleworth	1/31st	
J. G. Wilson	3/62nds	
A. D. Bradford	1/31st	
C. F. W. Austin	1/31st	
H. Shepherd	1/31st	
Alan Margetson	1/31st	
W. Lee Roberts	1/31st	
S. F. Bayer	1/31st	
E. J. Spalding	1/31st	
H. C. Bayer	1/31st	
[illegible] Bayer	1/31st	
H. M. Bayer	1/31st	
E. C. Davey	1/31st	
J. H. Davey	1/31st	
P. Stewart	1/31st	
A. S. H. Hull	3/62nds	
T. E. O. Hull	1/31st	10 (1937)

LESLIE LANGTON AGENT

8·23

Leslie Langton

A. & H. Hull ALAN MARGETSON AGENT

2·1/2

K. G. POLAND	1/19th	PER
C. A. SHEPHERD	1/38th	
F. B. COOPER	1/38th	
C. M. COOPER	1/38th	
E. SASSOON	1/38th	
F. J. CRESSUM	1/38th	
H. W. NORDEN	1/19th	
KEMSLEY	1/38th	
B. S. EVANS	1/38th	
A. M. SASSOON	1/38th	
R. E. HEATH	1/38th	
A. D'AMBRUMENIL	1/19th	
J. G. DAVISON	1/38th	
J. H. V. DOCWRA	1/38th	
P. L. BELVILLE	1/38th	
P. H. [illegible]	1/38th	
[illegible]	1/38th	
B. C. S. HOLLERN	1/38th	
D. A. POLAND	1/38th	
[illegible]	1/38th	
SHEPPARD	1/38th	
SUDLEY	1/38th	
A. S. K. DE A. GORE	1/38th	
J. M. FOWLER-SEAVERNS	1/38th	
H. CLARK	1/38th	
J. E. GODDARD	1/38th	
[illegible]	1/38th	
[illegible]	1/38th	
[illegible]	1/38th	
A. G. [illegible]	1/38th	
P. L. [illegible]	1/38th	
B. P. [illegible]	1/38th	
G. L. LEWY	1/38th	
J. F. C. DUGDALE	1/38th	
F. B. CHILDE	1/38th	

4·11

109 (1937)

564

Form J No. 52342

LLOYD'S, LONDON.

Kenneth Band

CALIFORNIA FRUIT GR[illegible] EXCHANGE ET AL

. . Dollars

£ 25,000 @ % £/901:00 :

Policy and Stamp :25 :

£ 901:25 :

Date of Expiry 1st November, 1937 Noon - L.S.T.

The Assured is requested to read this Policy, and, if incorrect, return it immediately for alteration.

In the event of any occurrence likely to result in a claim under this Policy, immediate notice should be given to:—

NEVILLE DIXEY	3/26ths	PER
H. F. S. LEVIE	3/52nds	
WILLIAM PALMER	3/52nds	
C. ALEXANDER HARVEY	3/26ths	
S. WALTER MORRIS	3/52nds	
E. H. CHAMBERS	3/52nds	
THOMAS ARMSTEAD	3/52nds	
A. E. CHAMBERS	3/52nds	
GUSTAV. BENCKY	3/52nds	
FRANKLIN LUSHINGTON	3/52nds	
FYFE DUTHIE	3/52nds	
V. P. LOBB	3/52nds	
W. F. HALFORD	1/26th	
W. A. P. PHILLIPS	1/26th	
E. H. JOHNSON	3/52nds	
C. A. G. McLAGAN	3/52nds	

4·12

Neville Dixey

232 (1937)

P. F. CHAPLIN	3/47ths	J. F. H. HOULDSWORTH	3/17[illegible]
T. D. DOBSON	3/47ths	H. W. HOULDSWORTH	3/47[illegible]
ISAAC WOLFSON	3/47ths	JOHN BOURNE	3/[illegible]
H. D. SPRATT	3/47ths	STAFFORD BOURNE	3/[illegible]
JAMES JOHNSTON	3/47ths	E. C. HOLBOYDE	3/[illegible]
LEONARD ARNOTT	3/47ths	W. D. ROBERTS	3/[illegible]
PERCY FISHER	3/47ths	J. H. GARNETT	3/[illegible]
JAMES ROBERTS	3/47ths	R. W. JOHNSON	2/[illegible]

4·11

NEVILLE DIXEY & C. A. HARVEY

PER 36794 198 (1937)

C. Alexander Harvey

T. NORMAN FRIZZELL	6/78ths	
CHAS. C. EYERS	6/78ths	
J. BEATH	3/78ths	
F. K. KIFFBERG	6/78ths	
WALTER LAWRENCE	6/78ths	
S. L. CHAPPELL	2/78ths	
C. G. DAWSON	4/78ths	
C. A. HEWITT	4/78ths	
R. G. TRENEST	2/78ths	
F. C. LANE	5/78ths	
G. H. PRESTON	5/78ths	of 86
C. B. G. DEWITT	2/78ths	
G. F. C. LAW	2/78ths	
[illegible]	[illegible]	
F. E. FARMER	[illegible]	
C. D. SMITH	4/78ths	
G. V. PALMER	2/78ths	
A. D'AMBRUMENIL	4/78ths	
G. W. SCOTT	3/78ths	
F. P. A. LANGTON	1/78th	
H. LISSINGTON	3/78ths	
A. V. PALMER	5/78ths	
R. H. A. LAWSON	2/20ths	
A. W. [illegible]	2/20ths	
[illegible] FRIZZELL	1/20th	of 14%
G. [illegible]	2/20ths	
H. LISSINGTON	2/20ths	

NORMAN FRIZZELL & PARTNERS, LTD.

3·29

PER 724/36

975 (1937)

T. Norman Frizzell

CHARLES H. ROBERTS	1/19th	PER
RHAYADER	1/19th	
T. L. L. ROBERTS	2/19ths	
A. E. ROBERTS	5/19ths	
F. W. MILLIGAN	1/19th	
A. C. ROBERTS	1/19th	
A. E. GREENWELL	2/19ths	
J. C. STEVENS	1/19th	
E. DEANE	1/19th	
P. ARNOLD	1/19th	
W. D. BISHOP	1/19th	
F. W. CLARK	1/19th	
R. PALTRIDGE	1/19th	

Roberts & Hill Agency — Alfred Metham Agency

3·29

A. Metham.

482 (1937)

A. E. ROBERTS	1/2	PER
C. H. ROBERTS	1/4th	
RHAYADER	1/4th	

·41

T. C. N. Roberts. 675A

622 (1937)

S. J. TROUNCE	1/22nd	PER
H. J. ARDRON	2/22nds	
H. W. ISAACS	2/22nds	
A. I. EVANS	2/22nds	
M. G. ISAACS	1/22nd	
P. I. FITZGERALD	1/22nd	
C. H. COWAN	1/22nd	
D. G. ISAACS	1/22nd	
J. W. SUTTON	1/22nd	
READING	1/22nd	
E. EDWARD LEVY	1/22nd	
F. W. COOKE	1/22nd	
MELCHETT	1/22nd	
R. WALEY COHEN	1/22nd	
G. H. BOOKER	1/22nd	
G. B. ISMAY	1/22nd	
P. TIARKS	1/22nd	
A. CUNARD	1/22nd	
I. A. DE H. LYLE	1/22nd	

ARBON, LANGRISH & Co. Ltd., Agents

4·12

S. J. Trounce

Fid 146

585 (1937)

31

EXHIBIT "D"

United States Fidelity and Guaranty Company
Baltimore, Maryland
(A Stock Company)
(Emblem)

EXCESS COMMERCIAL BLANKET BOND
(Standard Form AA)
No. 02-308-37

Know All Men by These Presents, That in consideration of an annual premium, the United States Fidelity and Guaranty Company (hereinafter called Surety) hereby agrees to indemnify those designated as Employer in Joint Insured Rider attached hereto as a part hereof of.....
(hereinafter called Employer) to an amount not exceeding in the aggregate, for all losses under this bond, the sum of Twentyfive Thousand dollars ($25,000.00), against That Part of Any and All Direct Loss or Losses which any one or more of the Employees, as defined in Section A, paragraph 2, shall cause to the Employer In Excess of the amount or amounts carried under the primary fidelity suretyship described in Section A, paragraph 2, on the Employee or Employees, respectively, causing such loss or losses, through any act or default covered under said primary fidelity suretyship and not excluded under Section A, paragraph 5, and committed by such Employee or Employees, acting directly or in collusion with others, during the term of this bond as defined in Section A, paragraph 1, and

Exhibit "D"—(Continued)

while this bond and said primary fidelity suretyship are in force as to such Employee or Employees, and discovered, as provided in Section B, paragraph 2, before the expiration of twelve months from the cancellation of this bond as to such Employee or Employees, or the cancellation of this bond as an entirety, whichever shall first happen.

This bond is executed and accepted subject to the agreements and limitations set forth in Section A of this bond and the conditions set forth in Section B of this bond, which conditions shall be conditions precedent to recovery under this bond.

Section A

1—The term of this bond begins with the 1st day of November, 1937, standard time at the address of the Employer above given, and ends at 12 o'clock night, standard time as aforesaid, on the effective date of the cancellation of this bond; and the payment of annual premiums during such term shall not render the amount of this bond cumulative from year to year.

2—The word "Employees" as used in this bond means only those natural persons located within any of the States of the United States and within the District of Columbia, the Hawaiian Islands, Alaska, Canada or Newfoundland, who are, on the effective date of this bond, in the service of the Employer and covered by name or position under the existing primary fidelity suretyship listed herein below, and

Exhibit "D"—(Continued)

those natural persons so located who shall be, at any time during the term of this bond, in the service of the Employer and covered by name or position under said primary fidelity suretyship, or under additional primary fidelity suretyship hereafter taken out in a company agreed upon in writing between the Employer and the Surety. The word "Employees," however, does not mean firms and corporations nor does it mean brokers, factors, commission merchants, consignees, contractors and agents or representatives of the same general character.

The Existing Primary Fidelity Suretyship Is as Follows:

Schedule Bond No. 14815-03-62-12—favor California Fruit Growers Exchange, et al. [32]

3—(a) The Employer must, throughout each premium year of the term of this bond, carry under said primary fidelity suretyship on each Employee covered thereunder at the beginning of such premium year not less than the amount carried under said primary fidelity suretyship on such Employee at the beginning of such premium year, and agreed upon by the Employer and the Surety as the minimum amount to be carried on such Employee, and must, in case any successor be named during any premium year for any Employee, carry under said primary fidelity suretyship on such successor, throughout the remainder of such premium year, not less than the amount carried under said primary

Exhibit "D"—(Continued)

fidelity suretyship on the Employees so succeeded. If, during any premium year the Employer shall cover under said primary fidelity suretyship any natural person but not as the successor of any Employee, and shall desire such person to be covered under this bond, the Employer must carry under said primary fidelity suretyship on such person throughout the remainder of such premium year not less than the amount to be agreed upon in writing between the Employer and the Surety. (b) If the Employer shall reduce the amount of primary fidelity suretyship required by this bond to be carried on any Employee, the Surety shall be liable on account of loss caused by such Employee, only in case such loss be in excess of the amount so required to be carried, and then for not more than such excess. If the Employer shall increase the amount of primary fidelity suretyship required by this bond to be carried on any Employee the Surety shall be liable on account of loss caused by such Employee through any act or default committed after the date of such increase, only in case such loss be in excess of such increased amount, and then for not more than such excess.

4—If any natural persons shall be taken into the service of the Employer, through merger or consolidation with some other concern, the Employer shall give the Surety written notice thereof. If the persons so taken into the service of the Employer be covered under primary fidelity suretyship, in accord-

Exhibit "D"—(Continued)

ance with the provisions of paragraphs 2 and 3 of Section A of this bond, and if as a result thereof there be an increase in the number of Employees covered under this bond, then the Employer shall pay to the Surety an additional premium computed pro rata from the date of such merger or consolidation to the end of the current premium year.

5—(a) If said primary fidelity suretyship gives coverage or indemnity against losses caused by acts or defaults broader than larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication or other fraudulent or dishonest acts, this bond, notwithstanding such broader coverage or indemnity shall be liable only in case any Employee or Employees shall cause an excess loss or losses under said primary fidelity suretyship through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication or other fraudulent or dishonest acts, and then for not more than such excess. (b) If said primary fidelity suretyship limits liability for loss to the loss of certain designated classes or kinds of property, then this bond shall be liable only in case such loss or loses as aforesaid are of such designated property, and then for not more than such excess. (c) If the time limits specified in said primary fidelity suretyship for discovery of, or making claim for, loss after the expiration, termination or cancellation thereof as an entirety, or for filing notice of loss, for filing proof

Exhibit "D"—(Continued)

of loss or for bringing suit are less than the corresponding time limits in this bond, then this bond shall be subject to the time limits specified in said primary fidelity suretyship as if written herein. (d) If the time limit specified in said primary fidelity suretyship for the discovery of, or making claim for, or for filing proof of loss for, loss after the happening of any of the events specified in Section A, paragraph 8, be greater or less than the corresponding time limit in this bond, then this bond shall be subject to the time limit specified in said primary fidelity suretyship as if written herein, provided, however, that in no event shall the time for discovery of, or making claim for, or for filing proof of loss for, any such loss be extended beyond the time within which, under the terms of this bond, losses must be discovered or claims must be made or proof of loss filed after the cancellation hereof as an entirety. (e) If said primary fidelity suretyship contains any limitation, condition or warranty, other than those above mentioned, which is not inconsistent with any such limitation, condition or warranty in this bond, then this bond shall be subject to such limitation, condition or warranty as if written herein.

6—Any sum paid in settlement of any loss under this bond shall be deducted from the amount of this bond, such deduction to be effective as of the date upon which the Employer sends to the Surety notice of such loss, and only the remainder of such amount

Exhibit "D"—(Continued)

shall apply to other losses resulting from acts or defaults covered by this bond whether committed before said date or thereafter, or partly before and partly thereafter. The sum so deducted shall be automatically restored as of said date but only as to losses resulting from acts or defaults covered by this bond which shall be committed thereafter; and in consideration of such restoration the Employer shall pay to the Surety, on demand, an additional premium computed pro rata upon the sum so restored from said date of restoration to the end of the premium year. In no event shall the Surety be liable under this bond for an amount greater than that specified in line 6 of this bond on account of any one loss or series or losses caused by any Employee or combination of Employees.

7—In case any reimbursement be obtained or recovery be made by the Employer or the Surety on account of any loss covered under this bond, the net amount of such reimbursement or recovery, after deducting the actual cost of obtaining or making the same, shall be applied to reimburse the Employer in full for that part, if any, of such loss in excess of the aggregate of the amounts of all bonds, insurance and indemnity, including this bond, taken by or for the benefit of the Employer and covering such loss, and the balance, if any, or the entire net reimbursement or recovery, if there be no such excess loss, shall be applied to that part of such loss covered by this bond, or, if payment shall have been

Exhibit "D"—(Continued)

made by the Surety, to its reimbursement therefor. The Employer shall execute all necessary papers and render all assistance, not pecuniary, to secure unto the Surety the rights provided for in this paragraph. The following shall not be reimbursement or recovery within the meaning of this paragraph: suretyship, insurance or reinsurance, also security or indemnity taken from any source by or for the benefit of the Surety.

8—This bond shall be deemed cancelled as to any Employee: (a) immediately upon discovery by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; (b) upon the effective date of the termination or cancellation of said primary fidelity suretyship as to such Employee or as to the position filled by such Employee; (c) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served upon the Employer or sent by registered mail. Such last mentioned date, if the notice be served, shall be not less than fifteen days after such service, or if sent by registered mail, not less than twenty days after the date borne by the sender's registry receipt. [33]

9—This bond shall be deemed cancelled as an entirety: (a) upon the effective date of the termination or cancellation of said primary fidelity

Exhibit "D"—(Continued)

suretyship; (b) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served by the Employer upon the Surety or by the Surety upon the Employer, or sent by registered mail. Such last mentioned date, if the notice be served by the Surety, shall be not less than thirty days after such service, or, if sent by the Surety by registered mail, not less than thirty-five days after the date borne by the sender's registry receipt. In case of cancellation the Surety shall, on demand, refund to the Employer the unearned premium computed pro rata, but such return premium shall be repaid to the Surety in case of payment of a loss under this bond.

Section B

1—No Employee, to the best of the knowledge of the Employer, or, if the Employer be a co-partnership, of any partner thereof, or, if the Employer be a corporation, of any officer thereof not in collusion with such Employee, has committed any fraudulent or dishonest act in any position in the service of the Employer or otherwise.

2—The Employer shall notify the Surety by telegram or registered letter addressed and sent to it at its Branch office in the City of Los Angeles, California, of any act or default on the part of any Employee which may involve a loss hereunder at the earliest practicable moment, and at all events not later than thirty days after discovery thereof

Exhibit "D"—(Continued)

by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee.

3—Within ninety days after discovery as aforesaid of any act or default committed by any Employee and causing loss covered by this bond the Employer shall file with the Surety affirmative proof of loss, itemized and duly sworn to, with the name of such Employee, and shall, if requested by the Surety, produce from time to time, for examination by its representatives, all books, documents and records pertaining to such loss.

4—No suit to recover on account of loss under this bond shall be brought before the expiration of three months from the filing of proof as aforesaid on account of such loss, nor after the expiration of twelve months from discovery as aforesaid of the fraudulent or dishonest act causing such loss.

5—If any limitation in this bond for giving notice, filing claim or bringing suit is prohibited or made void by any law controlling the construction of this bond, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

Exhibit "D"—(Continued)

Signed, sealed and dated this 15th day of November, 1937.

UNITED STATES FIDELITY AND GUARANTY COMPANY

T. HARTLEY MARSHALL
Vice-President

ROBERT H. SAYRE
Assistant Secretary [34]

RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 02-308-38 issued by the United States Fidelity and Guaranty Company, Surety, in favor of California Fruit Growers Exchange, et al, Employer, in the amount of Twenty five Thousand Dollars ($25,000.00), and dated the 1st day of November, 1937.

It is hereby understood and agreed that, notwithstanding any provision to the contrary of the bond to which this rider is attached, the surety will not claim salvage nor will it require the employer to apply as salvage or in reduction of any loss or claim under said bond, any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account of the insurance plan for employees known as the Sunkist Provident Plan; that insofar as the rights of the surety under said bond are concerned no claim for loss arising under said bond

Exhibit "D"—(Continued)

shall in any way be reduced or otherwise affected by the operation or existence of the said Sunkist Provident Plan, or any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account thereof.

The attached bond shall be subject to all its terms, agreements, limitations and conditions except as herein expressly modified.

This rider shall be effective on and after the 1st day of November, 1937.

Signed, sealed and dated this 15th day of November, 1937.

UNITED STATES FIDELITY AND GUARANTY COMPANY
T. HARTLEY MARSHALL
Vice-President
ROBERT H. SAYRE
Assistant Secretary [36]

Rider

To be attached to and form a part of Excess Commercial Blanket Bond No. 02-308-37 issued by the United States Fidelity and Guaranty Company, Surety, in favor of California Fruit Growers Exchange, et al, Employer, in the amount of Twenty-five Thousand Dollars ($25,000.00), and dated the 1st day of November, 1937.

It is hereby understood and agreed that, not-

Exhibit "D"—(Continued)

withstanding any provision to the contrary of the bond to which this rider is attached, in case a loss is alleged to have been caused by the fraud or dishonesty of one or more of a group of Employees, all of whom are covered under the attached bond, and the Employer shall be unable to designate the specific employee or employees causing such loss, the Employer shall nevertheless have the benefit of the attached bond, provided that the evidence submitted reasonably establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees of the said group, and provided further that the liability of the Surety for any such loss shall not exceed in the aggregate the sum of Twenty five Thousand Dollars ($25,000.00).

The attached bond shall be subject to all its terms, agreements, limitations and conditions except as herein expressly modified.

This rider shall be effective on and after the 1st day of November, 1937.

Signed, sealed and dated this 15th day of November, 1937.

UNITED STATES FIDELITY AND GUARANTY COMPANY

T. HARTLEY MARSHALL
Vice-President

ROBERT H. SAYRE
Assistant Secretary. [37]

Exhibit "D"—(Continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland
(A Stock Company)
[Emblem]

JOINT INSURED RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 02-308-37 issued by the United States Fidelity and Guaranty Company, hereinafter called Surety, in favor of those hereinafter designated as Employer in the amount of Twenty five Thousand Dollars ($25,000.00), and dated the 1st day of November, 1937.

In consideration of the premium charged for the attached bond it is understood and agreed, anything in the attached bond to the contrary notwithstanding, as follows:

1—That from and after the time this rider becomes effective the following are covered under the attached bond and designated as Employer

California Fruit Growers Exchange
Blessing Electric and Manufacturing Company
California Fruit Exchange
The Exchange Orange Products Company
Exchange Lemon Products Company

2—That notice cancelling the attached bond as an entirety, or as to any or all of those designated as Employer or as to any Employee shall be given as provided therein either by the Employer first named

Exhibit "D"—(Continued)

in the paragraph hereof numbered 1 or the Surety to the other, as the case may be.

3—That the attached bond shall be deemed cancelled as to any Employee immediately upon discovery by any Employer, or by any partner of any Employer, if a partnership, or by any officer of any Employer, if a corporation, not in collusion with such Employee of any fraudulent or dishonest act on the part of such Employee.

4—That the Employer first named in the paragraph hereof numbered 1 shall, in accordance with the provisions of the attached bond and within the time therein specified after discovery by any Employer, or by any partner of any Employer, if a partnership, or by any officer of any Employer, if a corporation, not in collusion with such Employee, of any act or default on the part of any Employee which may involve a loss under the attached bond, give notice to, and furnish proof of loss to, the Surety, bring legal proceedings for its own account or as trustee for any Employer sustaining any loss, make adjustments and settlements on account of any loss and receive payment therefor in its own name, and any payment so made to the Employer first named in the paragraph hereof numbered 1 shall fully release the Surety on account of the loss so paid.

5—That regardless of the number of years the attached bond shall continue in force and of the number of premiums which shall be payable or

Exhibit "D"—(Continued)

paid, the Surety shall not be liable under the attached bond, whether to one or more of those covered under the attached bond as Employer, including those designated above and those heretofore and those hereafter covered as Employer, for more in the aggregate than the amount set forth in line 6 of the attached bond, subject nevertheless to subsection 6 of Section A thereof.

6—That the Surety may, at the request of, or with the consent of, the Employer first named in the paragraph hereof numbered 1, add to the list of those designated as Employer, increase or decrease the amount of the attached bond, issue any rider or riders to form a part thereof and/or cancel or anul any of the riders attached or to be attached thereto.

7—That if the attached bond be cancelled as an entirtey as herein provided, or in any other manner, there shall be no liability under the attached bond on account of any loss unless discovered before the expiration of twelve months from such cancellation, and that if prior to the cancellation of the attached bond as an entirety, the attached bond be cancelled as herein provided, as to any Employee, or be cancelled as to any Employer as herein provided or in any other manner, there shall be no liability under the attached bond on account of any loss caused by such Employee or sustained by such Employer unless discovered before the expiration of twelve months from such cancellation as to

Exhibit "D"—(Continued)

such Employee or as to such Employer, as the case may be.

8—That the attached bond shall be subject to all its agreements, limitations and conditions except as modified in, or in accordance with, this rider.

9—That this rider shall be effective on and after the 1st day of November, 1937, standard time, at the main office of the Employer first named in the paragraph hereof numbered 1.

Signed, sealed and dated this 15th day of November, 1937.

UNITED STATES FIDELITY AND GUARANTY COMPANY

T. HARTLEY MARSHALL
Vice-President

ROBERT H. SAYRE
Assistant Secretary

Accepted for itself and all other Employers covered under the attached bond:

CALIFORNIA FRUIT GROWERS EXCHANGE

By R. S. [Illegible]
Assistant Secretary [38]

Exhibit "D"—(Continued)

[Emblem]

United States Fidelity and Guaranty Company
Baltimore, Maryland

RIDER

No. 02-308-37 $.....

To be attached to and form a part of Excess Commercial Blanket Bond, (Standard Form AA) No. 14815-02-308-37, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-Five Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, et al (hereinafter called Employer), and dated the 1st day of November, 1937.

Whereas, Lloyds issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective the First day of November, 1936, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and in favor of the Employer; and

Whereas, the prior bond, as of the effective date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time

Exhibit "D"—(Continued)

limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under the attached bond and the attached bond as extended by this rider, or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller.

4. That any sum or sums which shall be paid under the attached bond as extended by this rider on account of any loss or losses under the prior bond shall reduce or be deducted from the amount

Exhibit "D"—(Continued)

of the attached bond in the same manner and subject to the same conditions and limitations as payments under the attached bond, but any sum so reducing or deducted from the amount of the attached bond shall be restored thereto as therein provided.

Signed, sealed and dated this 12th day of January, 1938.

UNITED STATES FIDELITY AND GUARANTY COMPANY

J. ST. PAUL WHITE

Attorney-in-Fact.

Accepted:

CALIFORNIA FRUIT GROWERS EXCHANGE

By [Illegible],

Asst. Secretary. [39]

[Endorsed]:Filed Mar. 12, 1941. [40]

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon George E. Farrand, plaintiff's attorney, whose address is: 1028 Pacific Southwest Bldg., 215 W. 6th St., Los Angeles, California, an answer to the complaint which is herewith served upon you, with-

in 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] R. S. ZIMMERMAN,
Clerk of Court.
By J. M. HORN,
Deputy Clerk.

Date: March 12, 1941.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [41]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify that I served the annexed, Summons, and complaint, on the therein-named United States Fidelity and Guaranty Company, a corporation, by handing to and leaving a true and correct copy thereof with Harold Gillespie, designated agent, personally at Los Angeles in said District on the 14th day of March, A. D. 1941.

Marshal's Fees, $2.00; Expenses, $0.14. Total, $2.14.

ROBERT E. CLARK,
U. S. Marshal.
By J. P. LUVELLE,
Deputy.

[Endorsed]: Filed Mar. 17, 1941. [42]

[Title of District Court and Cause.]

MOTION AND ORDER AS TO AMENDMENT OF COMPLAINT

Comes now the plaintiff above named and moves the Court ex parte for an order that the complaint be amended by interlineation in conformity with the amendment to complaint heretofore filed pursuant to Rule 15 (a), Rules of Civil Procedure for the district courts of the United States. The undersigned counsel for plaintiff hereby represent to the Court that no pleading responsive to the complaint or the amendment thereto has been served.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
Attorneys for Plaintiff.

It is so Ordered.

Dated April 9, 1941.

H. A. HOLLZER,
District Judge. [43]

[Endorsed]: Filed Apr. 9, 1941. [44]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff above named and makes the following amendment to its complaint before any responsive pleading has been served or filed,

by striking therefrom certain portions thereof as follows:

1. Strike from the title of the said cause the words "an unincorporated association" found on page 1, lines 13 and 14;

2. Strike the words "an unincorporated association of" found on page 2, paragraph III, line 13, of the said complaint;

3. Strike the words "and were and are engaged in the business of issuing policies of Fidelity Insurance," found on page 2, paragraph III, lines 19 and 20 of the complaint.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
215 West Sixth Street
Los Angeles, California. [45]

AFFIDAVIT OF SERVICE BY MAIL

(C. C. P. 1....1)
(Must be attached to original or a true copy of paper served)

State of California,
County of Los Angeles—ss.

The undersigned affiant, being sworn says that She is, and was at the time of the service hereinafter mentioned, a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within cause; that affiant's business address is 1028 Pacific Southwest Building,

215 West Sixth Street, Los Angeles, California; that affiant served a copy of the attached Amendment to Complaint by placing said copy in an envelope addressed to United States Fidelity and Guaranty Company at its office address 111 West 7th Street, Los Angeles, California; that said envelope was then sealed and thereafter on April 8, 1941, affiant deposited it in the mail at Los Angeles, California, with postage fully prepaid thereon; that there is, and at the time of such service was,

(a) delivery service by United States mail at the place so addressed;

NANCY DUNCAN
Affiant

Subscribed and sworn to before me April 8, 1941.

[Seal] JENNIE C. PATTERSON
Notary Public in and for the County of Los Angeles, State of California. [46]

[Endorsed]: Filed Apr. 9, 1941. [47]

[Title of District Court and Cause.]

ANSWER OF UNITED STATES FIDELITY AND GUARANTY COMPANY

Defendant, United States Fidelity and Guaranty Company, a corporation, answering the complaint of plaintiff, admits, denies and alleges:

First Defense.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

I.

Defendant admits the allegations contained in paragraphs I, II, III, IV, and V of plaintiff's complaint. [48]

II.

Answering paragraph VI of plaintiff's complaint, defendant admits that it executed and delivered to plaintiff a primary fidelity bond on or about October 23, 1912, with modifications thereof from time to time in writing by signed endorsements attached thereto as shown by "Exhibit A" attached to plaintiff's complaint, and alleges that in addition to the aforesaid endorsements, a schedule of the employees for whom coverage was afforded and the amount of the liability of defendant for acts of each of such employees, was listed from time to time under said bond, and denies that the coverage under said bond or the provisions thereof were other or different than as provided in said bond and the endorsements attached thereto as shown by said "Exhibit A" attached to plaintiff's complaint; defendant further admits that said primary bond was a continuing contract continuously in full force and effect from the 23rd day of October, 1912, to and including the time of the filing herein of this answer, but except as herein specifically admitted,

defendant denies each and every allegation in said paragraph.

III.

Defendant admits the allegations contained in paragraph VII of plaintiff's complaint, and in addition thereto, alleges that the certificate of insurance and policy of insurance therein referred to, were made, executed and delivered to plaintiff with the purpose and intent of Underwriting Members of Lloyd's and the persons by and on whose behalf said certificate and policy were issued to insure plaintiff against losses sustained by plaintiff by reason of the dishonesty or defalcations of any employee of plaintiff, including one Floyd E. Jones, as provided in said certificate and policy and occurring subsequent to the first day of November, 1935, and up to and including November 1, 1937, in the amount of $25,000.00, over and above and in excess of the coverage afforded to plaintiff by the terms of the primary bond issued to plaintiff by [49] *by* defendant United States Fidelity and Guaranty Company as shown by "Exhibit A" attached to and made a part of plaintiff's complaint.

IV.

Defendant admits the allegations contained in paragraph VIII.

V.

Answering paragraph IX of plaintiff's complaint, this answering defendant admits that on November 15, 1937, this defendant executed and delivered to

plaintiff its excess commercial blanket bond No. 02-308-37 effective as of November 1, 1937, and denies that said bond was executed or delivered prior to the expiry date of the Lloyd's excess blanket fidelity insurance referred to in said paragraph and elsewhere in plaintiff's complaint, and in that connection, alleges that said Lloyd's certificate and policy of excess insurance was at said time, and since has been, in full force and effect as to losses sustained by plaintiff during the period from November 1, 1935 to and including November 1, 1937, and particularly as to the losses alleged to have been sustained by plaintiff between May 1, 1937 and November 1, 1937.

Further answering said paragraph, defendant admits that "Exhibit D" attached to plaintiff's complaint is a photostatic copy of the excess fidelity bond executed by this defendant and of the endorsements and riders thereto attached, but except as herein specifically admitted, denies generally and specifically the remaining allegations of paragraph IX.

VI.

Answering paragraph X, this defendant admits that said Jones was listed as an employee of plaintiff as a loose fruit salesman; this defendant does not have knowledge or information sufficient to enable it to form a belief as to the truth of any of the other allegations of said paragraph X, and basing its denial upon [50] such lack of information and

belief, denies generally and specifically the remaining allegations of said paragraph.

VII.

Answering paragraph XI of the complaint, defendant admits that on or about July 31, 1940, plaintiff notified defendants that plaintiff had discovered that said Floyd E. Jones might not have accounted for moneys received by him on plaintiff's behalf; admits that thereafter, on or about August 15, 1940, plaintiff notified defendants that plaintiff had determined the fact of such claimed defalcations; admits that defendants in writing extended the time for filing proof of loss to November 15, 1940; admits that plaintiff procured an audit of the transactions of said Floyd E. Jones, but defendant alleges that it is without knowledge or information as to the truth, or correctness or falsity of said audit or of the truth of any of the matters and things alleged in said paragraph in said paragraph not herein specifically admitted, and basing its denial upon such lack of information and belief, denies generally and specifically the remaining allegations of said paragraph.

VIII.

Answering paragraph XII of the complaint, defendant admits that on or about October 30, 1940, plaintiff in writing notified defendants of the nature and amount of the claimed defalcations of said Jones during the year 1937 and filed sworn proofs

of loss and copies of the audit referred to in the complaint, but defendant alleges that it is without knowledge or information as to the truth of any of the matters referred to in said notice or proofs of loss, or said audit, and basing its denial upon such lack of information and belief, denies generally and specifically the remaining allegations of said paragraph not herein specifically admitted.

IX.

Defendant admits the allegations contained in paragraphs XIV, XV, and XVI of the complaint.

[51]

X.

Answering paragraph XVII of plaintiff's complaint this answering defendant admits that a controversy has arisen and exists as between the plaintiff and the respective defendants herein as to whether any losses in excess of the sum of One Thousand Dollars, ($1,000.00), were sustained by plaintiff during the period from May 1, 1937 to November 1, 1937, and as to whether such losses, if any, were sustained by reason of the alleged defalcations of said Floyd E. Jones, as an employee of plaintiff, and as to the nature and amount of said losses, if any.

Defendant further admits that a controversy has arisen and exists as between the defendants herein as to whether the liability, if any, to the plaintiff for a sum not exceeding Twenty-Five Thousand Dollars ($25,000.00), for the defalcations, if any,

of said Floyd E. Jones, during the period aforesaid, in excess of the sum of One Thousand Dollars ($1,000.00), rests upon the defendant Underwriting Members of Lloyd's or upon this answering defendant.

Defendant further admits, upon its information and belief, that defendant, Underwriting Members of Lloyd's, contends as alleged in said paragraph XVII of the complaint herein, and admits that defendant, United States Fidelity and Guaranty Company, contends as alleged by plaintiff in said paragraph XVII, and further contends as alleged in the Third Defense set forth in this answer to plaintiff's complaint which said Third Defense is hereby by reference, made a part hereof as fully as if set forth herein in full.

In this connection defendant United States Fidelity and Guaranty Company alleges that said excess losses, if any, claimed by plaintiff herein, occurred, if at all, during the currency of the excess blanket fidelity policy issued by Underwriting Members of Lloyd's to plaintiff, and during the currency of the primary bond executed by this defendant, and prior to the effective date of the [52] excess commercial blanket bond executed by this answering defendant, and that such losses, if any, were discovered during the currency of said primary bond and within three years subsequent to the expiry date of the excess fidelity blanket policy issued by Underwriting Members of Lloyd's, which said policy was not renewed.

Third Defense

I.

Defendant, United States Fidelity and Guaranty Company alleges that the primary fidelity blanket bond executed and delivered to plaintiff by this defendant was and is, a continuous contract in continuous effect from October 23, 1912, to the present time; that the losses claimed to have been sustained by plaintiff occurred (if they, or any of them occurred at all), during the currency of said Primary Bond executed by this answering defendant and during the currency of the excess insurance policy of defendant Underwriting Members of Lloyd's, to-wit, during the period between May 1, 1937, and November 1, 1937.

II.

This answering defendant, upon its information and belief, alleges that on or about November 1, 1935, defendant Underwriting Members of Lloyd's executed and delivered to plaintiff, an excess fidelity blanket policy, which was in full force and effect from November 1, 1935, to November 1, 1936, and which was of the same tenor and effect, as the certificate and policy shown by "Exhibits B and C" attached to the complaint of plaintiff.

III.

(A) The excess fidelity blanket policy issued by defendant Underwriting Members of Lloyd's, and shown by "Exhibit B" attached to plaintiff's com-

plaint, provides in paragraph 1 thereof as shown, at page 26 of the complaint, as follows:

> "1. This policy is to indemnify the assured against all such direct loss as the assured may sustain by reason [53] of the dishonesty of any employees in their employment who are bonded under a Bond or Bonds (hereinafter called Primary Bonds) issued by an approved insurance company, subject to the conditions hereinafter contained."

(B) And in paragraph 2 thereof, shown at page 26 of the complaint of plaintiff, it is provided:—

> "2. It is understood and agreed that such employees are bonded under the aforesaid primary bonds for a total aggregate amount of approximately $972,000.00 and that this policy of Excess Insurance only covers such portion of the ultimate net loss sustained by the Assured in respect of defalcations committed by any such employee subsequent to the 1st day of November, 1935, as shall be in excess of the amount for which such employee is bonded under the said Primary Bonds, provided always that Underwriters' liability in respect of any number of losses shall in no event exceed the sum of $25,000.00 in the aggregate."

(C) And in paragraph 4 thereof, shown at page 26 of the complaint of plaintiff, it is provided:—

> "4. It is further understood and agreed that this excess insurance is subject to all the terms

and conditions of the said Primary Bonds insofar as the same do not conflict with the terms and conditions herein contained, and it is a condition of this Policy that in event of the Underwriters acting as Surety under the said Primary Bonds withdrawing or cancelling their guarantee in respect of any of the employees for any reason the Underwriters hereto shall be automatically relieved of their obligations hereby undertaken as regards the acts of any such employee or employees [54] subsequent to the date of such withdrawal or cancellation."

(D) And in paragraph 5 thereof, shown at page 26 of the complaint of plaintiff, it is provided:—

"5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance."

IV.

Defendant alleges that where in said policy reference is made to "primary bond", such reference is to the primary bond executed by this answering defendant, as shown by "Exhibit A" attached to

plaintiff's complaint. Said excess fidelity policy issued by defendant Underwriting Members of Lloyd's on or about November 1, 1936 was not renewed subsequent to the 1st day of November, 1937.

V.

That by the terms of the primary bond issued to plaintiff by this answering defendant, no specific time was provided for the discovery of losses thereunder, it being the intent and purpose thereof that losses occurring during its currency within the limits of amount as to each employee of plaintiff, to-wit, the sum of One Thousand Dollars ($1,000.00) as to said Floyd E. Jones, and discovered during the currency of said primary bond, were and should be covered thereby, and pursuant thereto this defendant paid to plaintiff the full amount of the coverage under said primary bond on account of losses claimed to have been sustained by reason of the claimed defalcations of said Floyd E. Jones.

[55]

VI.

At and prior to the time of the issuance of the excess fidelity blanket policy of defendant, Underwriting Members of Lloyd's, on or about November 1, 1935, and at and prior to the time of the issuance of the excess fidelity blanket policy of defendant, Underwriting Members of Lloyd's shown in "Exhibits B and C" attached to plaintiff's complaint, plaintiff herein well knew the terms and

provisions of the primary bond of this answering defendant, and said Underwriting Members of Lloyd's, by and through their agents and representatives who negotiated each of said excess policies with plaintiff, examined said primary bond issued by this answering defendant and well knew its terms and provisions, and particularly well knew that, under the terms and conditions of said primary bond coverage was and is afforded to plaintiff, within the financial limits of said primary bond, for losses sustained by plaintiff and discovered during the currency of said primary bond, and in consideration of the premium paid by plaintiff therefor, intended, and provided that said Underwriting Members of Lloyd's should indemnify and insure plaintiff for losses sustained by plaintiff during the currency of said primary bond and during the currency of the respective excess policies, in a sum not exceeding Twenty-five Thousand Dollars ($25,000.00) in excess of the amounts provided for in said primary bond, intending and providing that said excess insurance should and did apply to such excess losses suffered and sustained by plaintiff as aforesaid and discovered by plaintiff within the period of not exceeding three years from the expiry date of said excess policy shown by "Exhibits B and C" attached to plaintiff's complaint.

VII.

That the losses alleged by plaintiff are alleged by plaintiff to have been sustained during the currency

of said primary bond and during the currency of said excess policy, shown by "Exhibits B and C", to-wit, between May 1, 1937, and November 1, 1937 and said losses [56] if any, are covered by said policy and the Underwriting Members of Lloyd's are liable to plaintiff therefor.

Wherefore, defendant prays that this court determine the controversy existing as between plaintiff and defendant Underwriting Members of Lloyd's and as between plaintiff and this answering defendant and as between defendants Underwriting Members of Lloyd's and this answering defendant, and upon such determination, the court render its judgment exonerating the defendant United States Fidelity and Guaranty Company from any and all liability herein and that defendant recover its costs and disbursements and have such other and further relief as to the court may seem just and proper.

MILLS & WOOD
By EDWARD C. MILLS
Attorneys for defendant,
United States Fidelity and
Guaranty Company.
711 C. C. Chapman Building
756 South Broadway
Los Angeles, California [57]

State of California,
County of Los Angeles—ss.

J. T. Quail, being by me first duly sworn, deposes and says that he is the Superintendent of Claims of the Los Angeles Branch Office of United States Fidelity and Guaranty Company, a corporation, one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true, and that he makes this verification for and on behalf of said defendant.

J. T. QUAIL

Subscribed and sworn to before me this 9th day of April, 1941.

[Seal] CARLETON B. WOOD
Notary Public in and for the County of Los Angeles, State of California. [58]

Received copy of the within Answer this 10th day of April, 1941.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
Attorneys for plaintiff.

[Endorsed]: Filed Apr. 15, 1941. [58½]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, AND STANLEY GRAHAM BEER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342.

Come now the defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Member of Lloyd's in Lloyd's Policy Number 52342, and answering the complaint herein for themselves alone and not for their co-defendant, admit, deny and allege as follows, to-wit:

I.

Defendants admit the allegations contained in Paragraphs I, II, III, IV and V of plaintiff's complaint.

II.

Answering Paragraph VI, these defendants deny that the coverage under the bond attached to the complaint and marked Exhibit "A", together with the endorsements thereon, or any of the provisions thereof, was other or different than as set forth on said Exhibit "A", and except as herein denied, these defendants admit all the allegations of Paragraph VI. [59]

III.

Answering Paragraph VII, these defendants deny that the certificate of insurance, together with the endorsements thereon, annexed to plaintiff's complaint and marked Exhibit "B", or that the certificate of insurance, together with the endorsements thereon, annexed to plaintiff's complaint and marked Exhibit "C", had any other purpose or effect or contained any other terms and conditions or contemplated anything other than is set out and contained in said Exhibits "B" and "C" and each of them, and except as hereinabove specifically denied, these defendants admit all the allegations of said Paragraph VII.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph VIII, and placing their denial upon that ground, deny generally and specifically each and every allegation thereof and the whole thereof.

V.

These defendants admit all the allegations contained in Paragraph IX of the complaint.

VI.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set out and contained in Paragraph X of plaintiff's complaint, and placing

their denial upon that ground, deny generally and specifically each and every allegation thereof and the whole thereof.

VII.

Answering Paragraph XI, these defendants admit that on July 31, 1940, plaintiff notified defendants that plaintiff had discovered that the said Floyd E. Jones might not have accounted for all monies received by him on plaintiff's behalf, for fruit sold by him; admit that thereafter, and on or about August 15, 1940, plaintiff notified defendants that plaintiff had determined the fact of [60] such claimed defalcations; admit that defendants, in writing, extended the time for filing proof of loss to November 15, 1940; and admit that plaintiff procured an audit of the transactions of the said Floyd E. Jones; but defendants are without knowledge or information sufficient to form a belief as to the truth of any of the other averments contained in Paragraph XI, except as herein specifically admitted, and placing their denial upon that ground, deny generally and specifically each and every other remaining allegation of said Paragraph XI, and the whole thereof.

VIII.

Answering Paragraph XII, defendants admit that on or before October 30, 1940, plaintiff, in writing, notified defendants of the nature and amount of the claimed defalcations of the said

Floyd E. Jones during the year 1937, and filed with defendants sworn proofs of loss and copies of the audit referred to in the complaint, but these defendants are without knowledge or information sufficient to form a belief as to the truth of any of the matters referred to in said notice or proofs of loss or said audit, or as to any other matters mentioned in said Paragraph XII not herein specifically admitted, and placing their denial upon that ground, deny generally and specifically each and every allegation thereof and the whole thereof.

IX.

These defendants have no knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs XIII, XIV and XVI of plaintiff's complaint, and placing their denial upon that ground, deny generally and specifically each and every allegation thereof and the whole thereof.

X.

Defendants admit all the allegations contained in Paragraph XV of the complaint. [61]

XI.

These defendants admit all the allegations contained in Paragraph XVII of the complaint, but in this behalf further allege that other and further controversies have arisen and exist between plaintiff and the respective defendants herein, as to whether any losses in excess of One Thousand Dol-

lars ($1000.00) were sustained by plaintiff during the period from May 1, 1937, to November 1, 1937, and as to whether such losses, if any, were sustained by reason of any alleged defalcations of the said Floyd E. Jones as an employee of plaintiff, and as to the nature and amount of said losses, if any, and that by admitting such contentions as are set forth in Paragraph XVII, these defendants do not limit their defenses or contentions to the matters therein specified, but allege that all their defenses, however arising, to which they are entitled, have been and were reserved and are herein and hereby reserved, and in this behalf allege further that they contend that they have no liability whatsoever under the certificate of insurance referred to as the Lloyd's policy, and whether arising out of the contentions set forth in Paragraph XVII or otherwise.

For a Further, Separate and Second Defense to plaintiff's complaint herein, these defendants allege:

I.

That the complaint fails to state a cause of action against these defendants, or a claim against these defendants upon which relief can be granted.

Wherefore, defendants pray that the Court determine the controversy herein set forth, and determine that these answering defendants are not liable to the pliantiff for any sum whatsoever, but that the liability to plaintiff, if any there is, rests

upon and is covered by the excess bond of defendant, United States Fidelity and [62] Guaranty Company, a corporation; that plaintiff take nothing as against these defendants by its complaint herein, but that these defendants recover costs and disbursements herein; and for such other and further relief as the Court deems meet and proper in the premises.

CHAS. E. R. FULCHER
Attorney for defendants,
Underwriting Members of
Lloyd's in Lloyd's Policy
Number 52342, and Stanley
Graham Beer, individually
and as representative of
the Underwriting Members
of Lloyd's in Lloyd's Policy
Number 52342. [63]

Received copy of the within Answer this 27th day of May, 1941.

GEORGE E. FARRAND,
EDWARD W. TUTTLE and
EDWARD E. TUTTLE,
By EDWARD E. TUTTLE
(Attorneys for Plaintiff)

[Endorsed]: Filed May 27, 1941. [64]

[Title of District Court and Cause.]

STIPULATION AND ORDER AMENDING COMPLAINT

It Is Hereby Stipulated by and between the plaintiff in the above entitled action and the defendants therein through their respective counsel that the complaint in said action may be amended by plaintiff as follows:

1. To insert a new paragraph to be known as paragraph IX-a immediately following paragraph IX of plaintiff's complaint where it appears on page 5 to read as follows:

> "Thereafter and on November 7, 1938, defendant United States Fidelity and Guaranty Company executed and delivered to plaintiff an excess commercial blanket bond number 14815-02-313-38, which bond provides, among other things, that its term should begin November 1, 1938. On November [65] 7, 1938, said excess commercial blanket bond was modified by four separate written riders executed by said defendant United States Fidelity and Guaranty Company and attached to said excess commercial blanket bond number 14815-02-313-38. On December 4, 1940 and again on February 17, 1941, said bond was further modified by riders executed by said defendant. A photostatic copy of said excess commercial bond and of said riders and of certain letter agreements modifying the same and of certain

certificates of renewal is annexed hereto as Exhibit "E" and made a part hereof by this reference. The purpose and effect of said excess commercial blanket bond as so modified was to insure as therein provided, the fidelity of plaintiff's employees, including said Jones, in the maximum sum of $25,000 over and above the amount of said primary bond and to cover, among other things, as therein provided any misconduct of such employees during the period from November 1, 1936 to November 1, 1937 for which a right of recovery against said defendant Underwriting Members of Lloyd's under its said policy number 52342 and against defendant United States Fidelity and Guaranty Company under said policy number 02-308-37 might be lost because of nondiscovery and lapse of time."

2. To change the word "bond" to "bonds" in paragraph XV of plaintiff's complaint where it appears in line 32 on page 7.

3. To change the word "bond" to "bonds" in paragraph XVI of plaintiff's complaint where it appears in line 10 on page 8 and to insert immediately following the word "Company" where it appears on said line 10, the words "or either of them".

4. To change the word "bond" to "bonds" in paragraph XVII of plaintiff's complaint where it appears in line 21 on page 8 and to insert imme-

diately following said word, the words "or either of them".

5. To strike the words "or the other of" in paragraph XVIII of plaintiff's complaint where it appears in line 28 on [66] page 9 of plaintiff's complaint and in lieu thereof to insert the words "of the three".

It Is Further Stipulated that upon the filing of the foregoing stipulation, plaintiff's complaint shall be deemed amended as provided for in this stipulation.

It Is Further Stipulated that by this stipulation none of said defendants shall be deemed to have waived any of its defenses and that each of the defendants herein shall have ten days after the filing of said amendment within which to amend their respective answers to said complaint.

Dated this 28th day of October, 1941.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
Attorneys for Plaintiff
MILLS & WOOD
By EDWARD C. MILLS
Attorneys for defendant
United States Fidelity and
Guaranty Company
711 C. C. Chapman Building
756 South Broadway
Los Angeles—Tel: TR 3788

CHAS. E. R. FULCHER
Attorney for defendants
Underwriting Members of
Lloyd's etc., et al.
823 Title Guarantee Building
Los Angeles—MU 5592.

It Is So Ordered

Dated: October 29, 1941.

H. A. HOLLZER,
Judge.

[Endorsed]: Filed Oct. 29, 1941. [67]

EXHIBIT "E"

(Cut)

United States Fidelity and Guaranty Company
Baltimore, Maryland
(A Stock Company)

EXCESS COMMERCIAL BLANKET BOND
(Standard Form AA)

No. 14815-02-313-38

Know All Men by These Presents, that, in consideration of an annual premium, the United States Fidelity and Guaranty Company (hereinafter called Underwriter) hereby agrees to indemnify those designated as Insured in Joint Insured Rider attached hereto as a part hereof of..... (hereinafter called Insured) to an amount not exceeding in the aggregate, for all losses under this

Exhibit "E"—(Continued)

bond, the sum of Twenty-five Thousand dollars ($25,000.00), against That Part of Any Loss which any one or more of the Employees, as defined in Section A, paragraph 2, shall cause to the Insured In Excess of the amount or amounts carried under the primary fidelity suretyship described in Section A, paragraph 3, on the Employee or Employees, respectively, causing such loss, through any act or default covered under said primary fidelity suretyship and not excluded under Section A, paragraph 5, and committed by such Employee or Employees, acting directly or in collusion with others, during the term of this bond as defined in Section A, paragraph 1, and while this bond and said primary fidelity suretyship are in force as to such Employee or Employees, and discovered, as provided in Section B, paragraph 2, and reported to the Underwriter before the expiration of twelve months from the cancellation of this bond as to such Employee or Employees, or from the cancellation of this bond as an entirety as provided in Section A, paragraph 9, or from its cancellation or termination as an entirety in any other manner, whichever shall first happen.

This bond is executed and accepted subject to the agreements and limitations set forth in Section A of this bond, and the conditions set forth in Section B of this bond, which conditions shall be conditions precedent to recovery under this bond.

Exhibit "E"—(Continued)

Section A

Term of Bond

1—The term of this bond begin with the 1st day of November, 1938, standard time at the address of the Insured above given, and ends at 12 o'clock night, standard time as aforesaid, on the effective date of the cancellation of this bond; and the payment of annual premiums during such term shall not render the amount of this bond cumulative from year to year.

Employees Defined

2—The word "Employee" or "Employees," as used in this bond, shall be deemed to mean, respectively, one or more of those natural persons located within any of the States of the United States or within the District of Columbia, the Hawaiian Islands, Alaska, Canada or Newfoundland, who are, on the effective date of this bond, in the service of the Insured and covered by name or position under the existing primary fidelity suretyship listed herein below, and those natural persons so located who shall be, at any time during the term of this bond, in the service of the Insured and covered by name or position under said primary fidelity suretyship, or under additional primary fidelity suretyship hereafter taken out in a company agreed upon in writing between the Insured and the Underwriter. The word "Employee" or "Employees," however, does not mean

Exhibit "E"—(Continued)

firms and corporations nor does it mean brokers, factors, commission merchants, consignees, contractors and agents or representatives of the same general character.

Primary Suretyship

3—The existing primary fidelity suretyship is as follows

Schedule Bond No. 14814-03-62-12—issued by the Underwriter in favor of the Insured.....

[68]

Primary Suretyship—Continued

(a) The Insured must, throughout each premium year of the term of this bond, carry under said primary fidelity suretyship on each Employee covered thereunder at the beginning of such premium year not less than the amount carried under said primary fidelity suretyship on such Employee at the beginning of such premium year, and agreed upon by the Insured and the Underwriter as the minimum amount to be carried on such Employee, and must, in case any successor be named during any premium year for any Employee, carry under said primary fidelity suretyship on such successor, throughout the remainder of such premium year, not less than the amount carried under said primary fidelity suretyship on the Employee so succeeded. If, during any premium year the Insured shall cover under said primary fidelity suretyship any natural person but not as the successor of any

Exhibit "E"—(Continued)

Employee, and shall desire such person to be covered under this bond, the Insured must carry under said primary fidelity suretyship on such person throughout the remainder of such premium year not less than the amount to be agreed upon in writing between the Insured and the Underwriter. (b) If the Insured shall reduce the amount of primary fidelity suretyship required by this bond to be carried on any Employee, the Underwriter shall be liable on account of loss caused by such Employee, only in case such loss be in excess of the amount so required to be carried, and then for not more than such excess. If the Insured shall increase the amount of primary fidelity suretyship required by this bond to be carried on any Employee the Underwriter shall be liable on account of loss caused by such Employee through any act or default committed after the date of such increase, only in case such loss be in excess of such increased amount, and then for not more than such excess.

Merger or Consolidation

4—If any natural persons shall be taken into the service of the Insured, through merger or consolidation with some other concern, the Insured shall give the Underwriter written notice thereof. If the persons so taken into the service of the Insured be covered under primary fidelity suretyship, in accordance with the provisions of paragraphs 2 and 3 of Section A of this bond, and if as a result there-

Exhibit "E"—(Continued)

of there be an increase in the number of Employees covered under this bond, then the Insured shall pay to the Underwriter an additional premium computed pro rata from the date of such merger or consolidation to the end of the current premium year.

Excess Suretyship

5—(a) If said primary fidelity suretyship gives coverage or indemnity against losses caused by acts or defaults broader than larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other fraudulent or dishonest acts, this bond, notwithstanding such broader coverage or indemnity shall be liable only in case any Employee or Employees shall cause an excess loss or losses under said primary fidelity suretyship through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other fraudulent or dishonest acts, and then for not more than such excess. (b) If said primary fidelity suretyship limits liability for loss to the loss of certain designated classes or kinds of property, then this bond shall be liable only in case such loss or losses as aforesaid are of such designated property, and then for not more than such excess. (c) If the time limits specified in said primary fidelity suretyship for discovery of, or making claim for, loss after the expiration, termination or cancellation thereof as an entirety, or for filing notice of loss, for filing proof

Exhibit "E"—(Continued)

of loss or for bringing suit are less than the corresponding time limits in this bond, then this bond shall be subject to the time limits specified in said primary fidelity suretyship as if written herein. (d) If the time limit specified in said primary fidelity suretyship for discovery of, or making claim for, or for filing proof of loss for, loss after the happening of any of the events specified in Section A, paragraph 8, be greater or less than the corresponding time limit in this bond, then this bond shall be subject to the time limit specified in said primary fidelity suretyship as if written herein, provided, however, that in no event shall the time for discovery of, or making claim for, or for filing proof of loss for, any such loss be extended beyond the time within which, under the terms of this bond, losses must be discovered or claims must be made or proof of loss filed after the cancellation hereof as an entirety. (e) If said primary fidelity suretyship contains any deductible or any limitation, condition or warranty, other than those above mentioned, which is not inconsistent with any such limitation, condition or warranty in this bond, then this bond shall be subject to such deductible or to such limitation, condition or warranty as if written herein.

Deductions and Reinstatement

6—Any sum paid in settlement of any loss under this bond shall be deducted from the amount of this

Exhibit "E"—(Continued)

bond, such deduction to be effective as of the date upon which the Insured sends to the Underwriter notice of such loss, and only the remainder of such amount shall apply to other losses resulting from acts or defaults covered by this bond whether committed on or before said date or thereafter, or partly before and partly thereafter. The sum so deducted shall be automatically restored as of said date but only as to losses resulting from acts or defaults covered by this bond which shall be committed thereafter; and in consideration of such restoration the Insured shall pay to the Underwriter, on demand, an additional premium computed pro rata upon the sum so restored from said date of restoration to the end of the premium year. In no event shall the Underwriter be liable under this bond for an amount greater than that specified in line 6 of this bond on account of any one loss or series of losses caused by any Employee or combination of Employees.

Disposition of Salvage

7—In case any reimbursement be obtained or recovery be made by the Insured or the Underwriter on account of any loss covered under this bond, the net amount of such reimbursement or recovery after deducting the actual cost of obtaining or making the same, shall be applied to reimburse the Insured in full for that part, if any, of such loss in excess of the aggregate of the amounts of all

Exhibit "E"—(Continued)

bonds, insurance and indemnity, including this bond, taken by or for the benefit of the Insured and covering such loss, plus the amount of any deductible applicable to such loss, and the balance, if any, or the entire net reimbursement or recovery, if there be no such excess loss, shall be applied to that part of such loss covered by this bond, or, if payment shall have been made by the Underwriter, to its reimbursement therefor. The Insured shall execute all necessary papers and render all assistance, not pecuniary, to secure unto the Underwriter the rights provided for in this paragraph. The following shall not be reimbursement or recovery within the meaning of this paragraph: suretyship, insurance or reinsurance; also security or indemnity taken from any source by or for the benefit of the Underwriter.

Cancellation As To Employees

8—This bond shall be deemed cancelled as to any Employee: (a) immediately upon discovery by the Insured, or, if the Insured be a copartnership, by any partner thereof, or, if the Insured be a Corporation, by [69] any officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; (b) upon the effective date of the termination or cancellation of said primary fidelity suretyship as to such Employee or as to the position filled by such Employee; (c) at 12 o'clock night, standard time as aforesaid,

Exhibit "E"—(Continued)

upon the effective date specified in a written notice served upon the Insured or sent by registered mail. Such last mentioned date, if the notice be served, shall be not less than fifteen days after such service, or if sent by registered mail, not less than twenty days after the date borne by the sender's registry receipt.

Cancellation As To Bond In Its Entirety

9—This bond shall be deemed cancelled as an entirety: (a) upon the effective date of the termination or cancellation of said primary fidelity suretyship; (b) at 12 o'clock night standard time as aforesaid, upon the effective date specified in a written notice served by the Insured upon the Underwriter or by the Underwriter upon the Insured, or sent by registered mail. Such last mentioned date, if the notice be served by the Underwriter, shall be not less than thirty days after such service, or, if sent by the Underwriter by registered mail, not less than thirty-five days after the date borne by the sender's registry receipt. The Underwriter shall, on request, refund to the Insured the unearned premium computed pro rata if this bond be cancelled by notice from, or at the instance of, the Underwriter, or at short rates if cancelled by notice from, or at the instance of, the Insured, but in case of payment of a loss under this bond, that proportion of such return premium as the amount of loss paid bears to the amount of this bond, shall be repaid to the Underwriter.

Exhibit "E"—(Continued)

Section B

Prior Fraud Or Dishonesty

1—No Employee, to the best of the knowledge of the Insured, or, if the Insured be a copartnership, of any partner thereof, or, if the Insured be a corporation, of any officer thereof not in collusion with such Employee, has committed any fraudulent or dishonest act in any position in the service of the Insured or otherwise.

Notice To Underwriter

2—The Insured shall notify the Underwriter by telegram or registered letter addressed and sent to it as its branch office in the City of Los Angeles, California, of any act or default on the part of any Employee which may involve a loss hereunder at the earliest practicable moment, and at all events not later than fifteen days after discovery thereof by the Insured, or, if the Insured be a copartnership, by any partner thereof, or, if the Insured be a corporation, by any officer thereof not in collusion with such Employee.

Proof Of Loss

3—Within four months after discovery as aforesaid of any act or default committed by any Employee and causing loss covered by this bond the Insured shall file with the Underwriter affirmative proof of loss, itemized and duly sworn to, with the name of such Employee, and shall, if requested by

Exhibit "E"—(Continued)

the Underwriter, produce from time to time, for examination by its representatives, all books, documents and records pertaining to such loss.

Time Limit For Suit

4—No suit to recover on account of loss under this bond shall be brought before the expiration of two months from the filing of proof as aforesaid on account of such loss, nor after the expiration of fifteen months from discovery as aforesaid of the fraudulent or dishonest act causing such loss.

Statutory Limitation

5—If any limitation in this bond for giving notice, filing claim or bringing suit is prohibited or made void by any law controlling the construction of this bond, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

Signed, sealed and dated this 7th day of November, 1938.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
[Illegible]
Vice President
[Illegible]
Assistant Secretary. [70]

Exhibit "E"—(Continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland
(A Stock Company)
(Cut)

RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-06-313-38 issued by the United States Fidelity and Guaranty Company, in favor of California Fruit Growers Exchange, Et Al, in the amount of Twenty Five Thousand Dollars ($25,000.00), effective the 1st day of November 1938, and subsequently increased to Fifty thousand Dollars ($50,000.00) by rider effective the 1st day of November 1940.

In consideration of an additional premium charged for the attached bond it is hereby understood and agreed as follows:

1. Paragraph 2 of Section A of the attached bond shall be and the same is hereby amended by deleting the word "or" between "Canada" and "Newfoundland" and substituting therefore a comma, and by inserting after "Newfoundland" the following:

or *Phillipine* Islands,

2. The attached bond shall be subject to all its agreements, limitations and conditions except as herein expressly modified.

3. This rider shall become effective as of the beginning of the 15th day of February, 1941, standard time as specified in the attached bond.

Exhibit "E"—(Continued)

Signed, sealed and dated this 17th day of February, 1941.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
T. HARTLEY MARSHALL
Vice President
[Illegible]
Assistant Secretary. [72]

R 2/25/41

United States Fidelity and Guaranty Company
Los Angeles Office
H. C. Gillespie, Manager
H. V. D. Johns, Associate Manager
111 West Seventh Street
Los Angeles, Calif.
Telephone: Trinity 3651

In Reply, Please Refer to Mr.....
and Quote Our File Number

This Is to Certify, that Excess Commercial Blanket Bond No. 14815-06-313-38 issued by the Undersigned dated the 1st day of November 1938, in the amount of Twenty-five Thousand & no/100 Dollars ($25,000.00) and in favor of California Fruit Growers Exchange, et al covers an indefinite term beginning on the 1st day of November, 1938, and ending with the cancellation of said bond; that said bond is now in full force and effect and will continue in full force and effect until cancelled.

Exhibit "E"—(Continued)

Signed, Sealed and Dated this 1st day of November, 1940.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
By J. ST. PAUL WHITE
Attorney-in-fact. [73]

(Cut)

Increase Rider—For Primary or Excess Commercial Blanket Bonds, with prospective restoration.
United States Fidelity and Guaranty Company
Baltimore - Maryland
(A Stock Company)

RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-06-313-38, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md. (hereinafter called Underwriter), in the amount of Twentyfive Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, et al (hereinafter called Insured), effective the 1st day of November, 1938.

Whereas, the Insured and the Underwriter have mutually agreed to increase the amount of the attached bond as hereinafter set forth;

Now, Therefore, in consideration of the increased premium charged for the attached bond in its increased amount, it is mutually understood and agreed as follows:

Exhibit "E"—(Continued)

1—That, subject to all the terms, conditions and limitations of the attached bond, the amount thereof shall be, and the same is hereby, increased to Fifty Thousand Dollars ($50,000.00) as to all direct losses resulting from acts or defaults covered by the attached bond which shall be committed after the 1st day of November, 1940.

2—That any sum hereafter paid on account of any loss resulting from acts or defaults committed either before or after said last mentioned date shall be deducted from any amount of the attached bond applicable at the time of notice to the Underwriter of the loss so paid to losses resulting from acts or defaults committed prior to said date, and also from the amount to which the attached bond is increased by this rider; but any sum so deducted from the latter amount shall be restored thereto as provided in the attached bond.

Signed,, sealed and dated this 4th day of December, 1940.

UNITED STATES FIDELITY AND GUARANTY COMPANY

T. HARTLEY MARSHALL
Vice-President

[Illegible]
Assistant Secretary [74]

Exhibit "E"—(Continued)
(Cut)

United States Fidelity and Guaranty Company
Baltimore, Maryland

September 25, 1940.

California Fruit Growers Exchange,
Los Angeles, California
Gentlemen:

Re: Excess Commercial Blanket Bond
#14815-02-313-38—

It is hereby understood and agreed that the letter we addressed you on September 18, 1940 under the above caption is effective November 1, 1937 so as to apply to Excess Commercial Blanket Bond #14815-02-313-38 and the superseded Excess Commercial Blanket Bond #14815-02-308-37 from the effective date to the cancel*a*tion date of each of the said bonds.

Very truly yours,
UNITED STATES FIDELITY AND GUARANTY COMPANY
[llegible]
Assistant Secretary.

R 10/7/40. [75]

Exhibit "E"—(Continued)
(Cut)

J. St. Paul White
Agent
United States Fidelity and Guaranty Company
Telephones: Trinity 7888 and Trinity 7889
365 Paramount Bldg.
Los Angeles, California

October 7, 1940

Mr. R. S. Hayslip, Asst. Secretary
California Fruit Growers Exchange
707 West Fifth Street
Los Angeles, California

Excess Commercial Blanket Bond
#14815-02-313-38

Dear Mr. Hayslip:

I enclose an original letter of September 18th addressed to you from the Home Office of USF&G Company, interpreting paragraph 3, section A of your above excess blanket bond to permit changes in the amounts of bond items in your underlying schedule Bond #14815-03-62-12.

Original letter of September 25th addressed to you from the Home Office of the Company, also enclosed, extends this interpretation under the existing blanket bond #14815-02-308-37 which ran for the year November 1, 1937, to November 1, 1938.

This, I believe, will satisfactorily adjust the question of changes in the underlying bonds which

Exhibit "E"—(Continued)

we discussed a short time ago. I suggest that the enclosed letters be attached to the bonds.

Very truly yours,
J. ST. PAUL WHITE

Enc. 2
W:M [76]

(Cut)

United States Fidelity and Guaranty Company
Baltimore, Maryland

September 18, 1940

California Fruit Growers Exchange,
Los Angeles, California
Gentlemen:

Re: Excess Commercial Blanket Bond
No. 14815-02-313-38

Paragraph 3 of Section A of this bond requires you to:—

1. Maintain at least the same amount of primary fidelity suretyship throughout a premium year as agreed upon for each Employee at the outset of the premium year as applicable to each such Employee or his successor.

2. Bond any Employee newly bonded at any time during the premium year under the primary fidelity suretyship, other than as successor of any bonded Employee, in at least such amount for the remainder of the premium year as is agreed upon.

Exhibit "E"—(Continued)

We agree that any changes which may be made at any time during any premium year under the primary fidelity suretyship, whether involving the reduction in amount of bond of any bonded Employee or successor, or the bonding of any Employee who was not bonded at the outset of any premium year, are automatically regarded as agreed upon in compliance with the requirements of Paragraph 3 of Section A of the bond.

We further agree that in automatically regarding as so agreed upon the reduction in amount of bond of any bonded Employee or successor, it is understood that this bond will then cover and apply as excess of any such reduced amount as and from the effective date of any such reduction.

The foregoing is intended to apply to ordinary routine changes made during the premium year under the primary fidelity suretyship, and is not intended to apply in the case of any general scale revision of the amounts agreed upon at the beginning of the premium year.

Yours very truly,

J. V. RICHARDSON

Assistant Secretary

R 10/7/40. [77]

Exhibit "E"—(Continued)

(Cut)

United States Fidelity and Guaranty Company
Los Angeles Office

H. C. Gillespie, Manager
H. V. D. Johns, Associate Manager
111 West Seventh Street
Los Angeles, Calif.
Telephone: Trinity 3651

In Reply, Please Refer to Mr..... and Quote Our File Number.

This Is to Certify, that Excess Commercial Blanket Bond No. 14815-02-313-38 issued by the Undersigned dated the 1st day of November 1938, in the amount of Twenty-five Thousand & no/100 Dollars ($25,000.00) and in favor of California Fruit Growers Exchange, et al covers an indefinite term beginning on the 1st day of November, 1938, and ending with the cancellation of said bond; that said bond is now in full force and effect and will continue in full force and effect until cancelled.

Signed, Sealed and Dated this 1st day of November, 1939.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
By J. ST. PAUL WHITE
Attorney-in-fact. [78]

Exhibit "E"—(Continued)

(Cut)

Superseded Suretyship Rider—F.
Same Company

Superseded Suretyship Rider for Primary Commercial Blanket Bond which supersedes Primary Commercial Blanket Bond, both bonds by same company; or for Excess Commercial Blanket Bond which supersedes Excess Commercial Blanket Bond, both bonds by same company.

United States Fidelity and Guaranty Company
Baltimore, Maryland
(A Stock Company)

RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-02-313-38 issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-five Thousand dollars ($25,000.00), in favor of California Fruit Growers Exchange, Et Al (hereinafter called Insured), and dated the 1st day of November, 1938.

Whereas, the said United States Fidelity and Guaranty Company issues Excess Commercial Blanket Bond No. 14815-02-308-37 (hereinafter called prior bond), dated the 1st day of November, 1937, in the amount of Twenty-five Thousand dollars ($25,000.00), and in favor of the Insured; and

Whereas, the prior bond, as of the effective date

Exhibit "E"—(Continued)

of the attached bond, has been cancelled or terminated by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under

Exhibit "E"—(Continued)

the attached bond and the attached bond as extended by this rider, or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller.

4. That liability under the prior bond and the attached bond shall not be cumulative in amounts, and to that end losses under the prior bond shall be paid first; and any sum or sums which shall be paid under the attached bond shall be deducted from the amount of the prior bond, and any sum or sums which shall be paid under the prior bond and/or under the attached bond as extended by this rider on account of any loss or losses under the prior bond shall reduce or be deducted from the amount of the attached bond in the same manner and subject to the same conditions and limitations as payments under the attached bond, but any sum or sums so reducing or deducted from the amount of the attached bond shall be restored thereto as therein provided.

Signed, sealed and dated this 7th day of November, 1938.

UNITED STATES FIDELITY
AND GUARANTY COMPANY

[Illegible]
Vice President

[Illegible]
Assistant Secretary

Exhibit "E"—(Continued)

Accepted: CALIFORNIA FRUIT GROWERS EXCHANGE, ET AL

By [Illegible] [79]

For use on ordinary Commercial Blanket Bond when written for two or more as Employer

United States Fidelity and Guaranty Company
Baltimore - Maryland
(A Stock Company)
(Cut)

JOINT INSURED RIDER

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-02-313-38 issued by the United States Fidelity and Guaranty Company, hereinafter called Underwriter, in favor of those hereinafter designated as Insured in the amount of Twenty-five Thousand Dollars ($25,000.00), and dated the 1st day of November, 1938.

In consideration of the premium charged for the attached bond it is understood and agreed, anything in the attached bond to the contrary notwithstanding, as follows:

1—That from and after the time this rider becomes effective the following are covered under the attached bond and designated as Insured

California Fruit Growers Exchange
Blessing Electric and Manufacturing Company
California Fruit Exchange
The Exchange Orange Products Company
Exchange Lemon Products Company

Exhibit "E"—(Continued)

2—That notice cancelling the attached bond as an entirety, or as to any or all of those designated as Insured or as to any Employee shall be given as provided therein either by the Insured first named in the paragraph hereof numbered 1 or the Underwriter to the other, as the case maye be.

3—That the attached bond shall be deemed cancelled as to any Employee immediately upon discovery by any Insured, or by any partner of any Insured, if a partnership, or by any officer of any Insured, if a corporation, not in collusion with such Employee of any fraudulent or dishonest act on the part of such Employee.

4—That the Insured first named in the paragraph hereof of numbered 1 shall, in accordance with the provisions of the attached bond and within the time therein specified after discovery by any Insured, or by any partner of any Insured, if a partnership, or by any officer of any Insured, if a corporation, not in collusion with such Employee, of any act or default on the part of any Employee which may involve a loss under the attached bond, give notice to, and furnish proof of loss to, the Underwriter, bring legal proceedings for its own account or as trustee for any Insured sustaining any loss, make adjustments and settlements on account of any loss and receive payment therefor in its own name, and any payment so made to the Insured first named in the paragraph hereof numbered 1 shall fully release the Underwriter on account of the so loss paid.

Exhibit "E"—(Continued)

5—That regardless of the number of years the attached bond shall continue in force and of the number of premiums which shall be payable or paid, the Underwriter shall not be liable under the attached bond, whether to one or more of those covered under the attached bond as Insured, including those designated above and those heretofore and those hereafter covered as Insured, for more in the aggregate than the amount set forth in line 10 of the attached bond, subject nevertheless to sub-section 6 of Section A thereof.

6—That the Underwriter may, at the request of, or with the consent of, the Insured first named in the paragraph hereof numbered 1, add to the list of those designated as Insured, increase or decrease the amount of the attached bond, issue any rider or riders to form a part thereof and/or cancel or annul any of the riders attached or to be attached thereto.

7—That if the attached bond be cancelled as an entirety as herein provided, or in any other manner, there shall be no liability under the attached bond on account of any loss unless discovered before the expiration of twelve months from such cancellation, and that if prior to the cancellation of the attached bond as an entirety, the attached bond be cancelled as herein provided, as to any Employee, or be cancelled as to any Insured as herein provided or in any other manner, there shall be no liability under the attached bond on account of any loss caused by such Employee or sustained by such

Exhibit "E"—(Continued)

Insured unless discovered before the expiration of twelve months from such cancellation as to such Employee or as to such Insured, as the case may be.

8—That the attached bond shall be subject to all its agreements, limitations and conditions except as modified in, or in accordance with, this rider.

9—That this rider shall be effective on and after the 1st day of November 1938, standard time, at the main office of the Insured first named in the paragraph hereof numbered 1.

Signed, sealed and dated this 7th day of November, 1938.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Illegible]

Vice President

[Illegible]

Assistant Secretary

Accepted for itself and all other Insureds covered under the attached bond:

CALIFORNIA FRUIT GROWERS EXCHANGE

By [Illegible] [80]

Rider

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-02-313-38 issued by the United States Fidelity and Guaranty Company, Underwriter, in favor of California Fruit Growers Exchange, Et Al, Insured, in the amount of Twenty-five Thousand Dollars ($25,-

Exhibit "E"—(Continued)

000.000) and dated the 1st day of November, 1938.

It is hereby understood and agreed that, notwithstanding any provision to the contrary of the bond to which this rider is attached, in case a loss is alleged to have been caused by the fraud or dishonesty of one or more of a group of employees, all of whom are covered under the attached bond, and the insured shall be unable to designate the specific employee or employees causing such loss, the insured shall nevertheless have the benefit of the attached bond, provided that the evidence submitted reasonably establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said employees of the said group, and provided further that the liability of the underwriter for any such loss shall not exceed in the aggregate the sum of Twenty-five Thousand Dollars ($25,000.00).

The attached bond shall be subject to all its terms, agreements, limitations and conditions except as herein expressly modified.

This rider shall be effective on and after the 1st day of November, 1938.

Signed, sealed and dated this 7th day of November, 1938.

UNITED STATES FIDELITY
AND GUARANTY COMPANY

[Illegible]
Vice President

[Illegible]
Assistant Secretary

Exhibit "E"—(Continued)

Accepted:

CALIFORNIA FRUIT GROWERS EXCHANGE, ET AL

By [Illegible] [81]

Rider

To be attached to and form a part of Excess Commercial Blanket Bond No. 14815-02-313-38 issued by the United States Fidelity and Guaranty Company, Underwriter, in favor of California Fruit Growers Exchange, Et Al, Insured, in the amount of Twenty-five Thousand Dollars ($25,000.00), and dated the 1st day of November, 1938.

It is hereby understood and agreed that, notwithstanding any provision to the contrary of the bond to which this rider is attached, the underwriter will not claim salvage nor will it require the insured to apply as salvage or in reduction of any loss or claim under said bond, any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account of the insurance plan for employees known as the Sunkist Provident Plan; that insofar as the rights of the underwriter under said bond are concerned no claim for loss arising under said bond shall in any way be reduced or otherwise affected by the operation or existence of the said Sunkist Provident Plan, or any payments of premium or of income, dividends, loan proceeds, cash values, interest, or any other moneys accruing or received on account thereof.

The attached bond shall be subject to all its

Exhibit "E"—(Continued)

terms, agreements, limitations and conditions except as herein expressly modified.

This rider shall be effective on and after the 1st day of November, 1938.

Signed, sealed and dated this 7th day of November, 1938.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Illegible]

Vice President

[Illegible]

Assistant Secretary. [82]

[Endorsed]: Filed Oct. 29, 1941. [83]

[Title of District Court and Cause.]

NOTICE OF FILING STIPULATION AND ORDER FOR AMENDMENT TO COMPLAINT

To: Defendant United States Fidelity and Guaranty Company, a corporation, and to Mills & Wood, its attorneys; and to Defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and to Chas. E. R. Fulcher, their attorney:

You, and Each of You, will please take notice that on Wednesday, October 29, 1941, the stipula-

tion providing, among other things, for the amendment of plaintiff's complaint, made and entered into by and between the parties to the above action through their [84] respective counsel on October 28, 1941, was presented to the Hon. H. A. Hollzer, Judge of the above entitled court, and that on said date said Judge signed the order attached to said stipulation ordering said stipulation filed and ordering that upon the filing of said stipulation, plaintiff's complaint should be deemed amended as provided for in said stipulation. Thereafter, and on said October 29, 1941, said stipulation and order was filed with the clerk of said court.

You, and Each of You, are further notified that in accordance with the provisions of said stipulation and order defendants herein shall have ten days from said October 29, 1941 within which to amend their respective answers to said complaint.

Dated: October 30, 1941.

GEORGE E. FARRAND
EDWARD W. TUTTLE
EDWARD E. TUTTLE
Attorneys for Plaintiff. [85]

Received copy of the within Notice this 30 day of October, 1941.

CHAS. E. R. FULCHER
Attorney for Defendants
Underwriting Members,
etc., et al.

Received copy of the within Notice of Filing this 30 day of October, 1941.

MILLS & WOOD
By EDWARD C. MILLS
Attorneys for Defendant
United States Fidelity &
Guaranty Co.

[Endorsed]: Filed Oct. 31, 1941. [86]

[Title of District Court and Cause.]

AMENDED ANSWER OF UNITED STATES FIDELITY AND GUARANTY COMPANY

Comes now United States Fidelity and Guaranty Company, a corporation, and makes this its amended answer to the complaint of plaintiff as amended.

I.

Defendant admits the allegations contained in paragraph XV and XVI of plaintiff's complaint, as amended.

II.

Answering paragraph XVII of plaintiff's complaint, as amended, defendant reiterates its original answer to said paragraph, and further in that behalf, allege that other and further controversies have arisen and exist as to whether any losses in excess of One Thousand Dollars were sustained by plaintiff during the period from May 1, 1937, to

November 1, 1937, and as to whether such losses were sustained by reason of any defalcation of said Floyd E. Jones, as an employee of plaintiff, and as to the nature and amount of said losses, if any, and that defendant, by its admissions herein, does [87] not limit its defenses or contentions to the matters alleged in said paragraph XVII of the complaint, but allege that all its defenses, however arising, to which it is entitled, have been and were reserved, and defendant contends that it has no liability under either or any of the bonds issued by it, whether arising out of the contentions set forth in paragraph XVII or otherwise.

III.

Answering paragraph IXa of plaintiff's complaint, as amended, defendant admits that on November 7, 1938, this defendant executed and delivered to plaintiff an excess commercial blanket bond, number 14815-02-313-38: Admits that said bond and the several endorsements and riders thereon were and are in substance and form as shown by the photostatic copies thereof and the endorsements and riders thereon, attached to and made a part of plaintiff's amendment to its complaint herein, and admits that the purpose and effect of said bond and the endorsement and riders thereon, as shown by said photostats, was and is as provided therein and not otherwise, and save and except as herein specifically admitted, defendant denies generally and specifically, each and every allegation contained in said paragraph.

Wherefore, defendant reiterates the prayer of its original answer herein.

MILLS & WOOD
By EDWARD C. MILLS
Attorneys for Defendant.

[88]

State of California
County of Los Angeles—ss.

J. T. Quail, being by me first duly sworn, deposes and says: That he is Superintendent of Claims for United States Fidelity and Guaranty Company, and this verification is made by affiant for the reason that said company is a corporation; that none of the officers are within the County of Los Angeles, and that affiant is an employee of said corporation who has investigated and has knowledge of the facts alleged in the within amended answer of United States Fidelity and Guaranty Company in the above entitled action; that he has read the foregoing Amended Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

J. T. QUAIL.

Subscribed and sworn to before me this 4 day of November, 1941.

CARLETON B. WOOD
Notary Public in and for said County and State.

[89]

Received copy of the within amended answer this 6th day of November, 1941.

GEORGE E. FARRAND
EDWARD E. TUTTLE
EDWARD W. TUTTLE
By STEPHEN M. FARRAND
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 6, 1941. [90]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, TO AMENDMENT TO COMPLAINT

Come now the defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and answering the amendment to complaint herein, heretofore filed on or about October 29, 1941, in pursuance of a stipulation between the parties,—for themselves alone and not for their co-defendant, admit, deny and allege as follows, to-wit:

I.

Admit all the allegations contained in Paragraph IX-a.

II.

Answering all the other allegations of amendment, these defendants refer to and incorporate herein as though here set out in full, each and all of the allegations set out and contained in these defendants' answer to the complaint herein.

Wherefore, defendants pray that the controversy herein set forth be determined by the Court, and that the Court determine [91] that these answering defendants are not liable to plaintiff for any sum whatsoever, but that the liability to plaintiff, if any there is, rests upon and is covered by the excess bonds of defendant, United States Fidelity and Guaranty Company, a corporation; that plaintiff take nothing as against these defendants by its complaint and amendment thereto, but that these defendants recover costs and disbursements herein; and for such other and further relief as the Court deems meet and proper in the premises.

CHAS. E. R. FULCHER

Attorney for defendants,
Underwriting Members of
Lloyd's in Lloyd's Policy
Number 52342, and Stanley
Graham Beer, individually
and as representative of the
Underwriting Members of
Lloyd's in Lloyd's Policy
Number 52342. [92]

Received Copy of the within Answer to Amendment to Complaint, this 7th day of November, 1941.

GEORGE E. FARRAND,
EDWARD W. TUTTLE and
EDWARD E. TUTTLE,
By STEPHEN M. FARRAND
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 7, 1941. [93]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated by and between plaintiff and defendant United States Fidelity and Guaranty Company, a corporation, said defendant being sometimes hereinafter referred to as "stipulating defendant" as follows:

1. (a) Whenever in this stipulation reference is made to "Primary Bond", it shall be deemed to refer to that certain bond issued by United States Fidelity and Guaranty Company to plaintiff under date of October 23, 1912, being Bond No. 603-12, a copy of which bond is attached to plaintiff's complaint as Exhibit "A".

(b) Whenever in this stipulation reference is made to "1937 bond", it shall be deemed to refer to that certain excess commercial blanket bond issued by United States Fidelity and [94] Guaranty Company to plaintiff, being bond No. 02-308-37 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is

attached to plaintiff's complaint as Exhibit "D". Whenever in this stipulation reference is made to "1938 bond", it shall be deemed to refer to that certain excess commercial blanket bond issued by United States Fidelity and Guaranty Company to plaintiff, being bond No. 14815-02-313-38 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is attached to plaintiff's complaint as amended as Exhibit "E". Said 1937 bond and said 1938 bond are sometimes herein collectively referred to as "excess bonds".

(c) Whenever in this stipulation reference is made to "Audit Report", it shall be deemed to refer to the audit report of Fuller, Eadie & Payne dated October 28, 1940, addressed to plaintiff.

(d) Whenever in this stipulation reference is made to "Lloyd's", it shall be deemed to refer to defendant Underwriting Members of Lloyd's in Lloyd's Policy No. 54342.

(e) Whenever in this stipulation reference is made to "Lloyd's Excess Policy", it shall be deemed to refer to the Certificate of Insurance and the Policy of Insurance, copies of which are set forth as Exhibits "B" and "C", respectively, to plaintiff's complaint.

2. This stipulation is made pursuant to the stipulation between the parties hereto dated November 10, 1941.

3. At all times from a date prior to May 1, 1937 to November 1, 1939, the Floyd E. Jones

named in plaintiff's complaint on file herein was employed as a loose fruit salesman by the plaintiff and that at all said times, said Floyd E. Jones was scheduled as an employee under the Primary Bond, with liability of the said surety company under said bond as to any defalcations of said Jones occurring prior to November 1, 1937 limited to the sum of $1000.00. [95] As of November 1, 1937 the limit of liability of the said surety company under said Primary Bond as to any defalcations of said Jones thereafter occurring was increased to $3000.00.

4. At the trial of this action plaintiff may introduce in evidence the Audit Report of Fuller, Eadie & Payne, dated October 28, 1940 addressed to the plaintiff, without the requirement of any auditors being present at said trial, insofar only, however, as said Audit Report refers or applies to schedules 1 to 10, inclusive, thereof, and this stipulating defendant hereby consents to the introduction in evidence of the said Audit Report insofar as it applies to the said aforementioned schedules. Nothing herein contained shall prevent plaintiff from offering in evidence at the trial additional schedules from said Audit Report, but this stipulating defendant reserves the right to object to the introduction in evidence of said additional schedules.

5. The losses reflected by said first ten schedules of said Audit Report were actually sustained by plaintiff and arose out of the defalcations of said Floyd E. Jones occurring during the period

from May 1, 1937 to November 1, 1937; said losses were of a nature as would be covered by the primary bond, by Lloyd's excess policy, by the 1937 bond and by the 1938 bond. This stipulating defendant does not, however, by this stipulation admit that it is liable for any of said losses under either its 1937 or its 1938 excess bonds.

6. Plaintiff has been paid the sum of $1,000.00 by this stipulating defendant covering the liability of said company under said primary bond during the period from May 1, 1937 to and including November 1, 1937. Plaintiff has also been paid by this stipulating defendant, in addition to said $1,000.00, the sum of $2,000.00, being the balance of this stipulating defendant's liability under said primary bond for losses due to the defalcations of said Jones occurring subsequent to November 1, 1937 and being in payment of all [96] losses, with the exception of $22.49, reflected by Schedules 11 and 12 of said Audit Report.

7. By reason of the foregoing, this stipulating defendant admits that the losses due to the defalcations of Jones occurring during the period from May 1, 1937 to and including November 1, 1937 as reflected by the first ten schedules of said Audit Report aggregate the sum of $23,019.22; that if the court should determine that this stipulating defendant is liable under either said 1937 bond or said 1938 bond for said loss then the judgment to be entered by the court against this stipulating defendant on account of the losses sustained by

plaintiff as reflected by the first ten schedules of said audit shall be in the sum of $22,019.22, being the full amount of said losses less the sum of $1,000.00 heretofore paid by this stipulating defendant under said primary bond.

8. Nothing in this stipulation contained shall constitute any admission by this stipulating defendant of liability under said 1937 bond or said 1938 bond, the sole purpose being to constitute an admission as to the extent of any liability of this stipulating defendant by reason of the losses reflected by the first ten schedules of said Audit Report in the event the court should determine this stipulating defendant to be liable under either said 1937 bond or said 1938 bond.

9. Plaintiff contends and claims that in addition to said losses herein stipulated to, it suffered additional losses during the period from May 1, 1937 to November 1, 1937 by reason of the defalcations of said Jones, and that said losses are covered by either said 1937 bond or said 1938 bond, which contentions and claims are denied by this stipulating defendant, and nothing herein shall be construed to prevent or restrict either party from offering evidence as to the existence or non-existence of such additional claimed losses.

10. This stipulation is not to be construed as in any [97] wise constituting an admission, stipulation or agreement that this stipulating defendant is liable to plaintiff in any sum whatsoever under either said 1937 bond or 1938 bond, or otherwise,

and that all defenses to such action are hereby expressly reserved, except as otherwise provided in this stipulation or in the pleadings heretofore filed herein.

11. Nothing contained herein shall be construed to prejudice or waive the right of either party hereto to appeal from or prosecute any appropriate proceeding to review such judgment as may be entered herein, except as to the amount, character and nature of said losses herein referred to and that said losses were occasioned through the defalcations of said Jones at a time when he was employed by plaintiff and scheduled under said primary bond.

Dated this 19th day of March, 1942.

FERRAND & FERRAND
Attorneys for Plaintiff
MILLS & WOOD
By EDWARD C. MILLS
Attorneys for Defendant
United States Fidelity and
Guaranty Company.

[Endorsed]: Filed Mar. 20, 1942. [98]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated by and between plaintiff and defendants Underwriting Members of Lloyd's in Lloyd's Policy No. 54342 and Stanley Graham Beer, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy No. 54342, (said defendants being hereinafter referred to as "stipulating defendants"), as follows:

1. (a) Whenever in this stipulation reference is made to "Lloyd's", it shall be deemed to refer to defendant Underwriting Members of Lloyd's in Lloyd's Policy No. 54342.

(b) Whenever in this stipulation reference is made to "Lloyd's Excess Policy", it shall be deemed to refer to the Certificate of Insurance and the Policy of Insurance, copies of which are set forth as Exhibit "B" and "C", respectively, to [100] plaintiff's complaint.

(c) Whenever in this stipulation reference is made to "Primary Bond", it shall be deemed to refer to that certain bond issued by United States Fidelity and Guaranty Company to plaintiff under date of October 23, 1912, being Bond No. 603-12, a copy of which bond is attached to plaintiff's complaint as Exhibit "A".

(d) Whenever in this stipulation reference is made to "Audit Report", it shall be deemed to refer

to the audit report of Fuller, Eadie & Payne dated October 28, 1940, addressed to plaintiff.

2. This stipulation is made pursuant to the stipulation between the parties hereto dated November 1, 1941.

3. At all times from a date prior to May 1, 1937 to a date subsequent to November 1, 1937, the Floyd E. Jones named in plaintiff's complaint on file herein was employed as a loose fruit salesman by the plaintiff and that at all said times, said Floyd E. Jones was scheduled as an employee under the Primary Bond, with liability of the said surety company under said bond as to any defalcations of said Jones occurring prior to November 1, 1937 limited to the sum of $1000.00.

4. At the trial of this action plaintiff may introduce in evidence the Audit Report of Fuller, Eadie & Payne, dated October 28, 1940, addressed to the plaintiff, without the requirement of any auditors being present at said trial, insofar only, however, as said Audit Report refers or applies to schedules 1 to 10, inclusive, thereof, and these stipulating defendants hereby consent to the introduction in evidence of said Audit Report, insofar as it applies to the aforementioned schedules. Nothing herein contained shall prevent plaintiff from offering in evidence at the trial additional schedules from said Audit Report, but these stipulating defendants reserve the right to object to the introduction in evidence of such additional schedules.

5. The losses reflected by said first ten schedules of [101] said Audit Report were actually sustained by the plaintiff, and arose out of the defalcations of the said Floyd E. Jones occurring during the period from May 1, 1937 to November 1, 1937; said losses were of such a nature as would be covered by the primary bond and by Lloyd's excess policy, if the court should determine that Lloyd's excess policy is liable for any losses sustained by plaintiff. These stipulating defendants do not, however, by this stipulation admit that they are liable for said losses under said excess policy.

6. Plaintiff has been paid the sum of $1000.00 by defendant United States Fidelity and Guaranty Company covering the liability of said company under said primary bond during the period covered by the excess bond of Lloyd's referred to in plaintiff's complaint.

7. By reason of the foregoing, these stipulating defendants admit that the losses due to the defalcations of Jones occurring during the period covered by Lloyd's excess policy as reflected by the first ten schedules of said audit report aggregate the sum of $23,019.22; that if the court should determine that these stipulating defendants are liable under Lloyd's excess policy for said loss, then the judgment to be entered by the court against these stipulating defendants, and each of them, on account of the losses sustained by plaintiff as reflected by the first ten schedules of said audit shall be the sum of $22,019.22, being the full amount

of said losses less the sum of $1000.00 heretofore paid under said primary bond.

8. Nothing in this stipulation contained shall constitute any admission by these stipulating defendants of liability under Lloyd's excess policy, the sole purpose being to constitute an admission as to the extent of any liability of these stipulating defendants, and each of them, by reason of the losses reflected by the first ten schedules of said audit report in the event the court should determine these stipulating defendants to be liable under [102] Lloyd's excess policy.

9. Plaintiff contends and claims that in addition to said losses herein stipulated to, it suffered additional losses covered by Lloyd's excess policy during the period from May 1, 1937 to November 1, 1937 by reason of the defalcations of the said Jones, which contentions and claims are denied by these stipulating defendants, and nothing herein shall be construed to prevent or restrict either party from offering evidence as to the existence or non-existence of such additional claimed losses.

10. This stipulation is not to be construed as in any wise constituting an admission, stipulation or agreement that these stipulating defendants are liable to plaintiff in any sum whatsoever under Lloyd's excess policy, or otherwise, and that all defenses to such action are hereby expressly reserved, except as otherwise provided in this stipulation or in the pleadings heretofore filed herein.

Dated this 6th day of January, 1942.

FARRAND & FARRAND
Attorneys for Plaintiff
CHAS. E. R. FULCHER
Attorney for Defendants Underwriting Members of Lloyd's in Lloyd's Policy No. 54342 and Stanley Graham Beer, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy No. 54342.

[Endorsed]: Filed Mar. 20, 1942. [103]

At a stated term, to wit: The February Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 25th day of March in the year of our Lord one thousand nine hundred and 42.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1447-H Civil

[Title of Cause.]

Good cause appearing therefor, it is ordered that on or before April 1, 1942, counsel submit to one another for inspection all documents proposed to

be offered in evidence at the trial of the above-entitled matter;

It is further ordered that on or before April 1, 1942, counsel for plaintiff serve and file in duplicate in chambers, a memorandum containing a brief outline of the facts of the case and of the issues of law involved, together with brief excerpts from the authorities upon which such counsel will rely.

It is further ordered that on or before April 8, 1942, counsel for the respective defendants serve and file similar memoranda as to facts and issues only to the extent that plaintiff's summary is controverted, together with brief excerpts from the authorities upon which defendants' counsel will rely.

At 4:25 P.M. court adjourns. [105]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF FACTS AND OF ISSUES OF LAW

Pursuant to the minute order of this court, dated March 24, 1942, plaintiff submits the following memorandum of the facts of the case and of the issues of law involved:

In this memorandum the following references apply:

1. Whenever reference is made herein to "Pri-

mary Bond", it shall refer to that certain bond issued by defendant United States Fidelity and Guaranty Company to plaintiff under date of October 23, 1912, being Bond No. 603-12, a copy of which bond is attached to plaintiff's complaint as Exhibit "A".

2. Whenever reference is made herein to "Lloyd's", it shall refer to defendant Underwriting Members of Lloyd's in Lloyd's Policy No. 54342. [106]

3. Whenever reference is made herein to "Lloyd's Excess Policy", it shall refer to the Certificate of Insurance and the Policy of Insurance, copies of which are set forth as Exhibits "B" and "C", respectively, to plaintiff's complaint.

4. Whenever reference is made herein to "1937 bond", it shall refer to that certain excess commercial blanket bond issued by defendant United States Fidelity and Guaranty Company to plaintiff, being Bond No. 02-308-37 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is attached to plaintiff's complaint as Exhibit "D". Whenever reference is made herein to "1938 bond", it shall refer to that certain excess commercial blanket bond issued by defendant United States Fidelity and Guaranty Company to plaintiff, being Bond No. 14815-02-313-38 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is attached to plaintiff's complaint as amended as Exhibit "E". Said 1937

bond and said 1938 bond are sometimes herein collectively referred to as "excess bonds".

5. Whenever reference is made herein to "Audit Report", it shall refer to the audit report of Fuller, Eadie & Payne dated October 28, 1940 addressed to plaintiff.

STATEMENT OF FACTS

I.

On October 23, 1912 defendant United States Fidelity and Guaranty Company issued to plaintiff the primary bond which bond at all times since said date has been and now is in effect. A copy of said bond as modified from time to time by signed endorsements attached thereto is attached to plaintiff's complaint as Exhibit "A".

By the primary bond as so modified, defendant United States Fidelity and Guaranty Company guaranteed to pay to plaintiff any [107] pecuniary loss, including that for which plaintiff was responsible, occasioned by any acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or other criminal act of any of the employees listed thereunder, directly or through connivance, in any position and at any location in plaintiff's employ, and during the period commencing upon the date each such employee was listed thereunder and continuing until the termination of the suretyship as therein provided.

As of November 1, 1936 defendant Lloyd's issued

to plaintiff, Lloyd's excess policy in the amount of $25,000.00, copies of which are set forth as Exhibits "B" and "C" to plaintiff's complaint, the purpose and effect of which was to supplement the primary bond by extending the amount of coverage over and above the maximum liability under the primary bond to and not exceeding the sum of $25,000.00. Said excess policy covered the period commencing November 1, 1936 and ending November 1, 1937.

II.

Said Lloyd's excess policy was not renewed at its expiration date on November 1, 1937 but on said November 1, 1937 defendant United States Fidelity and Guaranty Company issued to plaintiff its excess commercial blanket bond, herein referred to as the 1937 bond, a copy of which bond as modified from time to time by signed endorsements attached thereto is attached to plaintiff's complaint as Exhibit "D". The purpose and effect of said 1937 bond as so modified was to insure as therein provided, the fidelity of plaintiff's employees scheduled under said primary bond, in the maximum sum of $25,000.00 over and above the amount of said primary bond, and to cover, among other things, as therein provided, any misconduct of such employees occurring during the period of said Lloyd's excess policy for which a right of recovery against defendant Lloyd's [108] might be lost because of non-discovery and lapse of time.

III.

Thereafter and on November 7, 1938, defendant United States Fidelity and Guaranty Company issued to plaintiff its excess commercial blanket bond, herein referred to as the 1938 bond, which bond provides among other things, that its term should commence November 1, 1938. A copy of said bond as modified from time to time by signed endorsements attached thereto is attached to plaintiff's complaint as exhibit "E". The purpose and effect of said 1938 bond was to insure the fidelity of plaintiff's employees scheduled under said primary bond in the maximum sum of $25,000.00 over and above the amount of said primary bond, and to cover, among other things, as provided in said bond any misconduct of such employees during the period from November 1, 1936 to November 1, 1937 for which a right of recovery against Lloyd's under Lloyd's excess policy and against defendant United States Fidelity and Guaranty Company under its 1937 excess commercial blanket bond might be lost because of non-discovery and lapse of time.

IV.

At all times from a date prior to May 1, 1937 to a date subsequent to November 1, 1937, one Floyd E. Jones was employed by the plaintiff as a loose fruit salesman, and during all of said times said Floyd E. Jones was scheduled as an employee under the primary bond with liability of defendant United States Fidelity and Guaranty Company

under said primary bonds as to any defalcations of said Jones occurring prior to November 1, 1937 limited to the sum of $1,000. During the period from May 1, 1937 to November 1, 1937, losses due to the defalcations of said Floyd E. Jones were actually [109] sustained by plaintiff in the sum of $23,019.22, as reflected by Schedules I to X inclusive of the Fuller, Eadie & Payne audit report. Said losses were of a nature as were covered by the primary bond, by Lloyd's excess policy, by the 1937 bond and by the 1938 bond.

V.

Plaintiff has been paid the sum of $1,000 by defendant United States Fidelity and Guaranty Company covering the liability of said company under its primary bond during the period from May 1, 1937 to and including November 1, 1937. As of November 1, 1937 the limit of liability of defendant United States Fidelity and Guaranty Company under said primary bond as to any defalcations of Floyd E. Jones thereafter occurring was increased to $3,000.00. Plaintiff has been paid by defendant United States Fidelity and Guaranty Company in addition to said $1,000 the sum of $2,000, being the balance of defendant United States Fidelity and Guaranty Company's liability under said primary bond for losses due to the defalcations of said Jones occurring subsequent to November 1, 1937.

VI.

By Stipulation As to Certain Facts entered into between plaintiff and defendant Lloyd's, dated January 6, 1942, and by Stipulation As To Certain Facts entered into between plaintiff and defendant United States Fidelity and Guaranty Company dated March 19, 1942, which said stipulations have been heretofore filed herein, defendant Lloyd's and defendant United States Fidelity and Guaranty Company have each respectively admitted the facts set forth in paragraph IV above, and have further admitted respectively that if the court should determine that it is liable for said loss then the judgment to be entered against it by the court on account of the [110] losses reflected by Schedules I to X of the Fuller, Eadie & Payne audit report shall be in the sum of $22,019.22, being the full amount of said losses less the sum of $1,000 heretofore paid by defendant United States Fidelity and Guaranty Company under said primary bond.

VII.

On or about July 31, 1940 plaintiff discovered for the first time that said Floyd E. Jones might not have accounted for all of the moneys received by him on plaintiff's behalf for fruit sold by him, and immediately notified defendants, Lloyd's and United States Fidelity and Guaranty Company, of that fact in the manner provided in said contracts of insurance. Thereafter plaintiff notified said respective defendants in writing of said loss and filed proofs of loss under said primary and

said excess fidelity insurance contracts all within the time and in the manner therein provided, and have otherwise duly performed all of the conditions on its part to be performed under each and every of said policies.

ISSUES INVOLVED

The only issue involved is as to whether liability to plaintiff for the said defalcations of Floyd E. Jones as above referred to rests upon defendant Lloyd's or upon defendant United States Fidelity and Guaranty Company. Defendant United States Fidelity and Guaranty Company contends that by the terms of its excess commercial blanket bonds or either of them it is not obligated to pay plaintiff for losses suffered by reason of any defalcations of plaintiff's employees as it contends that the defalcations of said Jones, as aforesaid, occurring between May 1 and November 1, 1937, as reflected by Schedules I to X, inclusive, of the Fuller, Eadie & Payne audit report, are covered by the Lloyd's excess policy and [111] that plaintiff is entitled to recover for said losses under said Lloyd's excess policy. Defendant Underwriting Members of Lloyd's contend that their policy does not cover the defalcations because of the following clause contained in said Lloyd's policy, to wit:

> "Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its

currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary bonds (but not exceeding three years) in which to discover losses claimable under this Insurance."

Defendant Lloyd's contend that within the meaning of the said quoted warranty there is no "Discovery clause" in the primary bond and that therefore their liability under the said warranty above quoted ceased with the "expiry date" of Lloyd's policy, to wit, November 1, 1937, noon, Pacific Standard time.

Defendant United States Fidelity and Guaranty Company contend that the term "discovery clause" as used in the above quoted warranty was not intended to be and is not limited to a specific clause in said primary bond providing for discovery, but was intended to and does mean merely the period of time within which under said primary bond losses must be discovered in order to be recoverable thereunder; that in the absence of specific limitation there is no definite time limit for discovery under said primary bond.

Both said 1937 bond and said 1938 bond issued by defendant United States Fidelity and Guaranty Company contain so-called superseded suretyship riders the effect of which is to provide that if said losses shall not be discovered within the time limited by the Lloyd's policy for the discovery of loss thereunder, said losses shall be covered by said

defendant United States Fidelity and Guaranty Company's excess commercial blanket bonds. Plaintiff therefore takes no position on the controversy existing between defendant Lloyd's and defendant United States Fidelity and Guaranty [112] Company, plaintiff contending merely that under one of the three of said excess fidelity policies mentioned it is entitled to be paid for the losses admittedly suffered by it by reason of the defalcations of said Floyd E. Jones during the year 1937 between May 1 and November 1, as reflected by Schedules I to X, inclusive, of the Fuller, Eadie & Payne audit report, namely, for the sum of $22,019.22, being the full amount of said losses admitted by defendants less the sum of $1,000 heretofore paid by defendant United States Fidelity and Guaranty Company under its said primary bond.

As plaintiff takes no position on said controversy, and as the controversy involves primarily the matter of the interpretation of the clause in the Lloyd's policy above quoted, plaintiff does not submit any points and authorities.

Respectfully submitted,
FARRAND & FARRAND
Attorneys for Plaintiff [113]

Received copy of the within Memorandum of Facts this 31st day of March, 1942.

MILLS & WOOD
By EDWARD O. MILLS
Attorney for Defendants

Received copy of the within Memorandum of Facts this 31st day of March, 1942.

CHAS. E. R. FULCHER
Attorney for Underwriters
of Lloyd's etc. et al.

[Endorsed]: Filed Mar. 31, 1942. [114]

[Title of District Court and Cause.]

MEMORANDUM OF FACTS AND ISSUES OF LAW OF DEFENDANT UNITED STATES FIDELITY AND GUARANTY COMPANY

Defendant, United States Fidelity and Guaranty Company, pursuant to the minute order of this Court, submits the following memorandum of the facts and of the issues of law involved:

1. In this memorandum, the references will be the same as contained in paragraphs numbered 1, 2, 3, 4 and 5 of the memorandum filed by plaintiff and appearing on pages 1 and 2 of plaintiff's memorandum.

STATEMENT OF FACTS

I.

Except as hereinafter set forth, the statement of facts and issues involved are as set forth in the memorandum of plaintiff. [115]

II.

The primary bond of United States Fidelity and

Guaranty Company is in substance and effect as set forth in the first subdivision of paragraph I of plaintiff's statement of facts, and its provisions were known to Lloyd's when and before its policy was issued, upon forms prescribed and provided by Lloyd's.

III.

As of November 1, 1936, defendant Lloyd's issued to plaintiff Lloyd's excess policy in the amount of $25,000.00, effective during the period from the 1st day of November, 1936, to the 1st day of November, 1937, covering losses over and above the primary limit on United States Fidelity and Guaranty Company's bond No. 14815-03-62-12, being the bond referred to as the primary bond.

IV.

Said Lloyd's excess policy provides:

"1. This policy is to indemnify the assured (plaintiff) against all such direct loss as the assured may sustain by reason of the dishonesty of any employees in their employment who are bonded under a bond or bonds (hereinafter called primary bonds) issued by an approved insurance company, subject to the conditions hereinafter contained."

"2. It is understood and agreed that such employees are bonded under the aforesaid primary bonds for a total aggregate amount of approximately $982,000, and that this policy of excess insurance only covers such portion of the

ultimate net loss sustained by assured in respect of defalcations committed by any such employee subsequent to the 1st day of November, 1935, as shall be in excess of the amount for which such employee is bonded under the said primary bonds," not in excess of $25,000.00.

"4. It is further understood and agreed that this excess insurance is subject to all the terms and con- [116] ditions of the said primary bonds insofar as the same do not conflict with the terms and conditions herein contained * *."

"5. Warranted free of all claim for losses occurring subsequent to the expiry date of this policy, and for losses not discovered during its currency, with the understanding that in event of non-renewal the assured shall have a period equal to that provided by the Discovery clause of the aforesaid primary bonds (but not exceeding three years) in which to discover losses claimable under this insurance."

(See printed form page 21 Exhibit to Complaint and typewritten form page 26 of Exhibit—both forms identical.)

V.

Said Lloyd's excess policy was not renewed at its expiration date on November 1, 1937, but on said November 1, 1937, defendant United States Fidelity and Guaranty Company issued to plaintiff its excess commercial blanket bond, herein referred to as the

1937 bond, a copy of which bond is modified from time to time by endorsements attached thereto, a copy of which is attached to plaintiff's complaint as Exhibit "D". That to said bond there was attached a rider, wherein said Lloyd's excess policy is referred to as the prior bond, and its cancellation or termination recited. said rider provides:

> "1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the time limited in the attached bond for the discovery of loss thereunder, provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated * *."
>
> (Page 38 of Exhibit attached to Complaint.) [117]

VI.

The 1938 bond of United States Fidelity and Guaranty Company referred to in paragraph III of plaintiff's memorandum had attached thereto a rider which is in identical language with that in the 1937 bond, except that it refers to the 1937 bond as the prior bond instead of Lloyd's policy.

ISSUES INVOLVED

The issues are whether liability for the losses reflected by schedules 1 to 10, inclusive, of the Fuller,

Eadie & Payne audit, rests upon Lloyd's, or United States Fidelity and Guaranty Company, and, in this connection, United States Fidelity and Guaranty Company contends such liability is imposed upon Lloyd's and not on United States Fidelity and Guaranty Company, for the following reasons:

1. United States Fidelity and Guaranty Company has paid and discharged all its liability to plaintiff, under its primary bond;

2. The Lloyd's policy makes specific reference to the primary bond, and thereby adopted the primary bond with full knowledge of the contents of that bond, including any provision or lack of provision for the time of discovery of losses;

3. None of the conditions in the primary bond in any manner conflicted with the terms or conditions of Lloyd's bond;

4. All losses claimed under schedules 1 to 10, inclusive, of the Fuller, Eadie & Payne audit, were discovered within three years from the non-renewal of the Lloyd's policy as of November 1, 1937;

5. It was and is the clear purpose and intent of paragraph 5 of Lloyd's policy to afford to the plaintiff a time beyond the event of non-renewal of Lloyd's policy, within which to discover losses occurring during the currency of the primary bond and during the currency of Lloyd's policy;

6. Such intent and purpose is clearly and definitely expressed in paragraph 5 of Lloyd's policy, but if, taken as a whole, [118] such paragraph is, in any wise, uncertain, or ambiguous, or

if its meaning is doubtful or susceptible to two constructions, it is to be construed liberally in favor of the insured and strictly against the insurer.

AUTHORITIES

(Unless otherwise stated, emphasis in quotations from authorities, are ours.)

"Furthermore, it is a fidelity bond, and will be given a more liberal construction than a contract which involves only the pure question of the rights and obligations of a surety."

First State Bank v. Metropolitan Cas. Ins. Co., 79 S. W. (2d) 835 (citing Couch's Cyclopedia of Insurance Law, Vol. 5, Sec. 1199a, p. 4324 and authorities there cited).

"Bonds or contracts of those companies which guarantee the fidelity of employees and which make the business one for profit, are essentially insurance contracts * * *. Therefore the rights and liabilities of the parties are governed in case of ambiguity by the rules of construction applicable to insurance, rather than by the rule strictissimi juris which determines the rights of ordinary guarantors or sureties without pecuniary consideration. (Citing numerous authorities.)"

Joyce on Insurance, (1918) Vol. 4, p. 4608, Sec. 2766.

"Another point to be considered in connection with risks and losses, is that fidelity guaranty insurance is a contract of indemnity; and inasmuch as obtaining full indemnity is the general purpose,

it should not be defeated except by limitations which are expressly and clearly set forth without ambiguity in the contract. (Citing cases.)"

Joyce on Insurance (1918) Vol. 4, p. 4609, Sec. 2766. [119]

"The rule is well established that a contract of fidelity or insurance susceptible of two constructions, one favorable to the insured and the other to the insurer, should be construed favorable to the former."

Hartford Acc. & Inc. Co. v. Swedish Methodist Assn., 92 Fe. (2d) 649, at 652

Citing:

First National Bank v. Hartford, Etc., 95 U. S. 673, 678; 24 L. Ed. 563

Thompson v. Phoenix Ins. Co., 136 U. S. 287; 10 S. Ct. 1019; 34 L. Ed. 408

American Surety Co. v. Pauly, 170 U. S. 133, 18 S. Ct. 552; 42 L. Ed. 977

See also:

State Bank of Prague v. American Surety Co., 288 N. W. 7 (Minn.)

"It being entirely clear that within the contemplation of the parties, their stipulations were for the purpose of affording indemnity to the obligee, all substantial doubts with respect to the meaning of the terms they employ should be resolved to effectuate that obvious intention."

Joyce on Insurance, (1918) Vol. 4, p. 4664, Sec. 2766

See also:

Century Digest, 4th Decennial Edition "Insurance", Sec. 146 (3). Citing cases from all State and Federal jurisdictions.

Court will not follow a refined construction of the language used by a surety in a fidelity bond, to defeat the promised and paid for protection under the bond.

Franklin Savings & T. Co. v. American Employers Ins. Co., 99 Fed. 494 [120]

The coverage under Lloyd's policy is and was intended to be as broad as under the primary bond, and if it is argued that there was no liability under the primary bond for losses not discovered within the current year of the currency of the primary bond, such contention is untenable.

Authority

Webster v. United States Fidelity and Guaranty Co., 153 So. 159 (Miss.) supports these statements. It is said in that case:

"When all the provisions of this rider are considered together, it appears that the only purpose of the claim last referred to is to continue the prior bond for the purpose of permitting a recovery *under the last bond for any losses recoverable under the prior bond.*"

"The last bond, which was executed May 14, 1928, contains no provision requiring losses thereunder to be discovered within any fixed time to create liability therefor, and therefore

the appellant is *entitled to recover under the terms and conditions thereof for losses occurring during the term thereof.*"

"We do not think the provision hereunder reviewed attempts to change or limit the statutory period for bringing suits, but it is rather one providing *what class of losses are covered* and limiting *liability* thereunder to those losses discovered within that period."

State Bank of Prague v. American Surety Co., 288 N. W. 7 (Minn.)

In that case the bond was in effect for one year. It provided for notice within a specified period after discovery and the filing of claim within three months after discovery. (Those [121] provisions were similar to those contained in the primary bond here involved.)

It was contended that the defalcation was not within the coverage, because, while it resulted from acts done within the coverage period, there was no liability because not discovered until afterward.

At page 12 of the opinion, the Court says:

"The policy does not expressly provide that it only shall cover losses discovered during the coverage period. Nor is it susceptible of that construction. The plain meaning of the language is that it covers losses resulting from acts of defalcation of the employee committed during the coverage period. Where, as here,

the insurance is to indemnify the insured against loss through the fraudulent and dishonest acts of his employe in connection with the duties of his employment, *the insurance covers all losses due to such acts committed during the coverage term,* whether *discovered during that time or afterwards.* United States v. Maryland Casualty Co., 4 Cir. 299 Fed. 942; Mid City Trust & Savings Bank v. National Surety Co., 202 Ill. App. 6. We decided Cary v. National Surety Co., 190 Minn. 185; 251 N. W. 123, and Farmers Co-op. Exchange Co. v. U. S. F. & G. Co., 150 Minn; 184 N. W. 792, upon assumption that such was the rule."

"Where there is doubt as to the meaning of such a policy, it is construed in favor of the insured as providing for such coverage. The uniform practice in deference to such rule, when the intention was to limit coverage to losses discovered during the coverage period, or within a certain time thereafter, has been to so provide in express terms in the policy. (Citing cases.)

* * * The failure to include such a limitation in the [122] policy involved here, should be construed as showing an intention that there was to be none. Although the loss was not discovered until after the coverage period had expired, the policy covered the defalcation in question since it occurred during the coverage period."

Any other construction, in the absence of an express provision for discovery during the currency of a bond or policy, leads to absurd consequences.

7. The coverage under Lloyd's policy is as broad as it is under the primary bond.

8. Paragraph 5 of Lloyd's policy says "Warranted free of all claims for losses occurring subsequent to the date of this policy and for losses not discovered during its currency", and if the provision stopped there, it would mean one thing, but immediately follows the qualifying language "with the understanding that in the event of non-renewal, the assured shall have a period equal to that provided by the Discovery clause of the aforesaid primary bonds (but not exceeding three years) in which to discover losses claimable under this insurance." The provision must be construed as a whole, and so construed, without a lesser time provided in the primary bond, gives three years from non-renewal for the discovery of losses occurring within its currency.

As to 1937 Excess Bond of United States Fidelity and Guaranty Company

This bond became effective as of November 1, 1937, the date of expiration of Lloyd's Excess policy, and covers losses sustained from the 1st day of November, 1937, to the effective date of the cancellation of the bond, and while both the excess bond and the primary bond of United States Fidelity and Guaranty Company are in force and dis-

covered before twelve months from the cancellation of the excess bond. [123]

All of the losses here involved occurred prior to November 1, 1937,—that is prior to the effective date of the 1937 excess bond.

By a rider attached to this 1937 bond, there is noted the fact of the Lloyd's Excess Fidelity Bond (called the prior bond) dated November 1, 1936, and of the termination or cancellation of the Lloyd's Bond, as of the effective date of the 1937 Excess bond of United States Fidelity and Guaranty Company. This rider provides:

> "Now, Therefore, it is hereby understood and agreed as follows:
>
> 1. That the attached bonds shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the time limited in the attached bond for discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults covering such loss or losses be such as are covered under the attached bond on its effective date."

This 1937 excess bond cannot cover the losses specified in schedules 1 to 10, inclusive, of the Ful-

ler, Eadie & Payne audit for these several reasons:

1. The losses did not occur, or were not sustained subsequent to the 1st day of November, 1937.

2. They were sustained during the currency of the primary bond and Lloyd's Excess policy, viz, between May 1, 1937, and November 1, 1937.

3. They were discovered within three years from the non-renewal, on November 1, 1937, of the Lloyd's policy, and not after the time for discovery under Lloyd's policy. [124]

4. The specified losses were recoverable under Lloyd's excess policy, first, because they were sustained during the currency of that policy and the currency of the primary bond and were discovered within the period of discovery specified in Lloyd's policy.

5. The evident and expressed purpose of that bond was not to relieve Lloyd's from liability imposed upon Lloyd's for losses occurring during the currency of Lloyd's policy, which were discovered within the discovery period of that policy, but to cover losses not covered by Lloyd's policy because of failure of discovery within the period specified in the Lloyd's policy.

Authorities

London & Lancashire Ins. Co. v. Peoples Nat. Bank, etc., 59 Fed., (2d) 149.

The case involved an identical situation as is involved under the 1937 excess bond of United States

Fidelity and Guaranty Company. There the Metropolitan Casualty Insurance Company issued a fidelity bond covering losses sustained during it currency and discovered within two years after its termination. The bond was superceded by one executed by London & Lancashire Insurance Company, and upon the latter becoming effective, the Metropolitan bond was cancelled and a rider was attached to the new bond, which, after reciting that the prior bond "may provide that any loss thereunder shall be discovered or claim therefor shall be filed, within a certain period after the final expiration or cancellation thereof" it is understood and agreed that the new bond should cover losses under the prior bond which shall be discovered after the expiration of the period for discovery, or, if no such period, after the bar of the statute of limitations and before the expiration of the time limited in the new bond for discovery of losses under it, and which would have been recoverable under the prior bond if it had not been terminated. The language is almost identical with that contained in the 1937 bond [125] of United States Fidelity and Guaranty Company. The Court says (page 151):

> "A careful study of the rider convinces us that appellant did not thereby undertake the assumption of any and all liability which might accrue under the Metropolitan contract, but only such as, accruing while the Metropolitan contract was in force, would not, under that contract, be enforceable if not discovered with-

in two years after the Metropolitan contract was terminated. By the terms of that contract, a loss occurring while it was in force would be recoverable if discovered within two years after termination of the contract; but if discovered more than two years after termination, no action would lie. Had the contract remained in force, the right of recovery would have persisted until the loss was discovered. Therefore, in canceling the Metropolitan contract the bank was deprived of the right of recovery for a loss occurring thereunder which was not discovered within two years after the cancellation. The new bond carried no indemnity against loss accruing prior to the issue, but not discovered within two years after the termination of the prior contract, that the rider was attached."

* * * * * *

"This alleged loss having been discovered by the indemnified bank within two years after the cancellation of the Metropolitan contract, it follows that it is not a loss for which appellant, by its rider, assumed to indemnify appellee, and it was not recoverable against appellant. It will therefore be unnecessary to inquire into the merits of the contention respecting Maple's alleged dishonest acts as the cause of that asserted item of loss." [126]

In Hartford Acc. & Ind. Co. v. Collin-Dietz Mor-

ris Co. 80 Fed. (2d) 441, a similar rider was involved. At page 445, the Court says:

> "The rider in question applies only to shortages which occurred during the currency of the bond of 1929 and which were discovered *more than* two years after that bond terminated. In other words, it applies exclusively to losses which were sustained prior to October 1, 1930, and which were not discovered *until after* October 1, 1932."

Citing:

London & Lancashire Ins. Co. v. Peoples Nat. Bank, Supra;

Maryland Casualty Co. v. First Nat. Bank, 246 Fed. 892.

Hartford Acc. & Ind. Co. v. Collins-Dietz, Etc., 80 Fed. (2d) 441.

In that case Metropolitan Casualty Insurance Company executed a fidelity bond dated March 4, 1927, which expired October 1, 1929. On October 1, 1929, Hartford Accident and Indemnity Company executed its bond, which terminated October 1, 1930. This bond covered losses occurring while it was in force and discovered within two years after its termination.

To this latter bond a rider was attached providing that the bond to which the rider was attached, should cover losses covered under the Metropolitan bond "which shall be discovered after the expiration of any such period, or, if there be no such pe-

riod, after the bar of the statute of limitations, and before the expiration of the time limited in the attached bond for loss thereunder—and which would have been recoverable under said fidelity suretyship (the Metropolitan bond) had it continued in force and also under the attached bond had such loss or losses occurred during the currency thereof." [127]

A third bond was executed by the Hartford Company on October 1, 1930, which terminated one year later. Its material provisions were identical with those contained in the previous bond, except that it referred to the previous bond of the same company. Of this rider the Court said (page 245):

> "The rider in question applies *only* to shortages which occurred during the currency of the bond of 1929 and which were discovered *more than* two years after that bond terminated. In other words, it applies exclusively to losses which were sustained *prior* to October 1, 1930, and which were not discovered until *after* October 1, 1932. Maryland Casualty Company v. First National Bank (C. C. A.) 246 Fed. 892; London & Lancashire Indemnity Co. v. Peoples National Bank (C. C. A.), 59 F. (2d) 149. There were no such shortages. All shortages were discovered before October 1, 1932."

As to the 1938 Excess Bond of United States Fidelity and Guaranty Company

This bond became effective November 1, 1938,

and covered losses sustained during its currency and during the currency of the primary bond. It covered losses sustained during its currency and during the currency of its primary bond, and discovered within twelve months from the cancellation of the 1938 bond. This bond carried a rider which refers only to the 1937 Excess bond, as "the prior bond", and which rider provides:

> "That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior (1937) bond which shall be discovered after the expiration of the time limited therein [128] for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder, provided that such loss or losses would have been recoverable under the prior (1937) bond had it not been cancelled or terminated; and provided further that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date."

While the losses claimed under schedules 1 to 10 of the Fuller, Eadie & Payne audit were not discovered within twelve months from the expiration of the 1937 bond, such losses were not recoverable under the 1937 bond, for the reasons already stated, viz, that such losses were discovered within the time specified in Lloyd's Excess policy and are recoverable under that policy.

Authorities

See Authorities cited hereinbefore

Our understanding is that plaintiff does not seek in this action to recover losses, if any, other than those reflected in Schedules 1 to 10, inclusive, of the Fuller, Eadie & Payne audit report.

For the reasons set forth, defendant United States Fidelity and Guaranty Company submits that the judgment of the Court should be that the losses here involved should be found to be chargeable to and covered by Lloyd's Excess policy, and that no liability exists as against United States Fidelity and Guaranty Company. To so hold, gives full effect to the language of the so-called "warranty" in Lloyd's certificate and its policy, evidencing the clear intent and purpose to cover losses sustained during its currency and discovered after its expiry date. To hold otherwise, has the effect to disregard [129] entirely the purport, meaning and intent of paragraph 5 of Lloyd's policy.

In view of the fact that this memorandum and the memorandum of defendant Lloyd's are being served concurrently, counsel for United States Fidelity and Guaranty Company beg leave to suggest that the Court grant to both defendants opportunity, at the Court's convenience, to present oral or written responses to the respective memoranda.

Respectfully submitted,

MILLS & WOOD

By EDWARD C. MILLS

Attorneys for Defendant
United States Fidelity and
Guaranty Company [130]

Received copy of the within Brief this 8th day of April, 1942.

CHAS. E. R. FULCHER,
Attorney for Underwriters
at Lloyds etc.

Received copy of the within memorandum of facts and issues this 8th day of April, 1942.

FARRAND & FARRAND
By STEPHEN M. FARRAND
Attorneys for plaintiff.

[Endorsed]: Filed Apr. 8, 1942. [131]

[Title of District Court and Cause.]

MEMORANDUM OF FACTS, ISSUES OF LAW AND AUTHORITIES OF DEFENDANTS, UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342.

Pursuant to the Minute Order of this Court, dated March 24, 1942, plaintiff has submitted a Memorandum of Facts of the case, and the issues of law involved.

We take no exception to plaintiff's Memorandum of Facts, and generally speaking, to its statement

of issues involved, but do not want to be understood as being limited by its reference to but one paragraph of Lloyd's policy, mentioned therein. We do agree entirely that plaintiff is entitled to judgment against United States Fidelity and Guaranty Company, (hereinafter referred to as "U. S. F. & G."), for $22,019.22, or against these defendants, (hereinafter referred to as "Lloyds"), for that amount.

To merely state the issues, with excerpts from authorities, would be of little aid to the Court, and we are therefore presenting some argument along with our decisions, but reserve the right to reply orally or in writing, as the Court may direct, to U. S. F. & G.'s Memorandum, since it will be filed simultaneously herewith, and we will prior to that time have no opportunity to [132] reply thereto.

BRIEF RECAPITULATION OF PERTINENT FACTS

In order to follow the argument we believe it will be helpful to state, as tersely as clarity will permit, a few of the pertinent facts. They are:

(1) On October 23, 1912, U. S. F. & G. issued to the plaintiff its primary policy, (Exhibit "A"), which has ever since continued in force;

(2) That policy has never contained a Discovery Clause;

(3) On November 1, 1936, Lloyds issued its excess certificate of insurance, (Exhibit "B");

(4) As of November 1, 1936, Lloyds issued its excess policy, (Exhibit "C");

(Note: The certificate is in the nature of a binder issued by a local agent, and remains effective until superseded by the policy, which comes from London, and is dated back to the date of the issuance of the certificate.)

(5) The certificate and policy were effective for one (1) year only, to-wit, from November 1, 1936, to November 1, 1937;

(6) Both Lloyds certificate and policy contained the following clause:

"Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds [133] (but not exceeding three years) in which to discover losses claimable under this Insurance."

(7) On November 1, 1937, Lloyds Excess Policy expired by its own terms, it having never been renewed;

(8) On November 1, 1937, U. S. F. & G. issued its Excess Policy, (Exhibit "D");

(9) On November 1, 1938, U. S. F. & G. issued its Excess Policy, (Exhibit "E");

(10) Both of U. S. F. & G.'s policies had attached thereto a rider commonly called a "continuity rider", or a "superseded suretyship rider", the pertinent portions of which read as follows, to-wit:

"1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date."

(11) The loss here involved was discovered by plaintiff on July 31, 1940. [134]

STATEMENT OF RESPECTIVE POSITIONS AND CONTENTIONS OF DEFENDANTS, LLOYDS AND U. S. F. & G.

As has been suggested by plaintiff, Lloyds asserts that it has no liability, because the discovery of the loss did not occur during the currency of its excess policy; that the paragraph above quoted is clear and definite; that there is no room for implication or interpretation, and that any other interpretation, rather than its clear provisions, would be in effect the making by the Court of a new and different contract than was entered into between the parties to the policy; that the purpose of

the continuity rider issued by U. S. F. & G. was to pick up any losses occurring during the currency of Lloyds policy, but not discovered within the time limited in Lloyds policy for the discovery thereof, and to thus make U. S. F. & G. liable therefor.

As we understand it, U. S. F. & G. contends that since there was no Discovery Clause in the primary policy, Lloyds is liable on its excess policy for all losses occurring during its currency, and discovered at any time prior to the limitation of three years, and that the only limitation on discovery, other than the limitation of three years above mentioned, is the limitation fixed by the Statute of Limitations.

Lloyds further contends that the policy does not so state; that the Statute of Limitations is not the same as a Discovery Clause, and that since the primary policy contained no Discovery Clause, the loss would have to be discovered during the period prescribed in Lloyds excess policy, to-wit. during its currency, and that the exception provided for in Lloyds policy, to this discovery period, never became operative or effective, due to the failure of the primary policy to contain a Discovery Clause. [135]

ARGUMENT

Some bonds contain no Discovery Clause. Some require discovery during the currency of the bond. Others have periods of three months, six months, one year, etc., etc.

Examples of Discovery Clauses are found in both the U. S. F. & G. excess bonds.

See Paragraph 5 (a) of Exhibit "D", page 32 of the complaint;

Paragraph 5 (a) of Exhibit "E" attached to the Stipulation for Amendment to Complaint.

Innumerable decisions involving Discovery Clauses have been the subject of decisions by the Court, and such clauses have been uniformly upheld.

The following are a few examples thereof:

City Bank vs. Bankers' Limited Mut. Cas. Co., (1931), 238 N. W. 819;

Thompson vs. American Surety Co., (1930), C. C. A. 8th, 42 F. (2d) 953;

Ballard vs. U. S. Fidelity and Gauaranty Co., 150 Ky. 236, 150 S. W. 1;

Chicora Bank vs. U. S. Fidelity and Guaranty Co., 161 S. C. 33, 159 S. E. 454, (1931);

Miners & Merchants Bank vs. U. S. F. & G. Co., 233 F. 654;

Florida Cent. & P. R. R. Co. vs. American Surety Co., 99 F. 674.

In the development of the history of surety bonds, the earlier bonds contained no Discovery Clause, while in later years Discovery Clauses were in many instances placed in surety bonds. [136]

As is obvious, Lloyds and other large insurance carriers endeavor, through a uniform clause, to protect themselves in relation to Discovery Clauses, so that a standard clause may be applicable in

cases where there is no Discovery Clause and where there is a Discovery Clause.

The paragraph under scrutiny here discloses, as we shall show, its applicability to all circumstances, so that if no Discovery Clause exists in, the primary policy, then the right of discovery ceases at the expiration of the time the excess policy was effective, and if the primary policy contains a Discovery Clause then the right of discovery under the excess policy is co-extensive with it,—not, however, to exceed three years.

We submit that the Lloyds policy is clear and definite, and for that reason the Court is without power, under the guise of construction, to make a new and different contract for the parties.

> As said in Loyalton, etc., vs. California, etc. Co., 22 Cal. App. 75, at 77, (133 Pac. 323:
>
> "Where parties have written engagements which industriously express the obligations which each is to assume, the Courts should be reluctant to enlarge them by implication as to important matters. The presumption is, that having expressed some, they have expressed all, of the conditions by which they intend to be bound. (Citing numerous cases)"

The law is well fixed and expresed in C. C. P., Section 1858, which provides as follows, to-wit:

> "Construction of Statutes and Instruments, General Rule. In the construction of a [137]

statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

See California R. Co. vs. Producers R. Corp., 25 Cal. App. (2d) 104, at 107; 76 Pac. (2d) 533, where the Court, quoting from the above section, italicized the words "Not to insert what has been omitted".

Another fundamental rule of construction here involved is well stated in 23 Cal. Jur., 758, Section 133, and supporting cases, as follows:

"Every Part to Be Given Effect. It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect, not only to the statute or code section as a whole, but to each and every part thereof,—i. e., to every word and clause, and certainly to every distinct or co-ordinate provision or section. Such meaning must be given, if possible, as will permit the whole statute to stand, and leave no part useless, or deprived of all sense and meaning, even to sustain the validity of the act. Words should never be considered unnecessary and surplusage, if a reasonable [138] construction can be adopted which will give force to and preserve all the terms of the statute. Any construction should be avoided which implies

> that the legislature was ignorant of the meaning of the language as employed, or that it used words in vain, the legal intendment being that each and every word or clause was inserted for some useful and sensible purpose, and that, when rightly understood, it may have some practical operation. If certain provisions are repugnant, effect should be given to those which best comport with the end to be accomplished and render the statute effective, rather than nugatory."

With these rules of construction in mind, let us now examine the clause in Lloyds excess policy above quoted.

We shall hereafter refer to the following portion thereof, to-wit:

> "Warranted free of all claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency,"

as the "main clause", and to the balance thereof, to-wit:

> "with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance."

as the "exception to the main clause".

Now, referring to the main clause separately, it

will be [139] observed that it is all inclusive; that is, that there could be no claim under this policy, where the loss was not discovered during the time the policy was in effect. This means,—

(1) If the policy was renewed;

(2) If the policy was not renewed.

The exception, which starts with the phrase "with the understanding", is the same as though it said "except", or "provided, however", or used similar terms.

Now, first, let us see whether a construction such as our opponent claims, would give effect to every word, phrase, sentence, etc., of this paragraph, as we are required to do in construing it under the above authorities.

If the primary policy contained a Discovery Clause of three months, six months, one year, etc., then of course full effect could be given to both Subdivision (1) and Subdivision (2) of the main clause, subject to the exception, and we could give full effect to the entire clause, in conformity with the rules of construction, since there would not then have been a renewal, and the main clause, subject to the exception, would be effectual. Since, however, the primary policy does not contain a Discovery Clause, it is impossible to give full effect to the main clause, and the second subdivision of the main clause becomes surplusage and is wholly without effect, if we are to construe the policy in the manner urged by our opponent.

If we are to construe the entire clause as meaning not what it says, but that the period of time for discovery under the excess policy shall be the same as it is under the primary policy, then what are we to do with the second subdivision of the main clause, —that is, the one which provides, in effect, that in the event of non-renewal, unless there is a Discovery Clause in the primary policy, then the right to discovery shall be co-extensive with the currency of the excess policy?

Such a construction would not be in accordance with the [140] recognized and fundamental rules of interpretation. However, if we construe the policy as is herein contended for, then we shall give full effect to all the phrases, sentences and words contained in the above quoted paragraph of Lloyds excess policy.

Let us now carry our analysis of the pertinent clause further.

In construing the language of a contract, the proper grammatical meaning of all words and phrases must be the guiding rule, unless a different intent is clearly disclosed.

Upon examination we find the following:

The words "Policy", "Assured", "Discovery Clause", and "Primary Policy are all capitalized. Why? Because they are proper nouns.

Foerster and Steadman's "Sentences and Thinking" says of capital letters:

"The two fundamental uses of capitals are

(1) to mark a new unit of thought, and (2) to designate a word as proper and not common." "Capitalize all proper nouns or adjectives. Names of persons or the equivalents of such names; names of races, languages, religious, political, social, legislative, educational, or military organizations; of wars, historical epochs or movements; of the days of the week, of the months, of holidays—are capitalized because they refer to specific, individual persons or things."

"It is often difficult to determine whether a given noun is proper or common. But the context will, in most cases, enable one to determine whether the reference is to a particular person or thing, or to any one of a class of persons or things." [141]

New Standard Dictionary, under "Capital Letter", says:

"A letter larger and more conspicuous than others of the same font and of a different form, as the 'A' in 'Africa'; used to distinguish proper names, for the beginning of paragraphs or lines of poetry, and for titles and display."

Now, it will be noted that each capital letter used in the clause under examination, is properly and advisedly used.

"Policy" refers to a particular policy. "Assured" refers to the particular assured. "Primary Policy" refers to the particular primary policy. Then what does "Discovery Clause" refer to? Does it not refer

to a particular thing,—a thing which can be definitely and specifically identified,—a thing expressly existing? Is it not clear that this term referred to something to be expressed in the primary policy, and not to something which might be implied? And if that thing to which it expressly referred, was nonexistent, then obviously the exception noted becomes inoperative, and the main clause becomes operative and effectual.

Next let us consider the other language contained in the paragraph under scrutiny.

Take the phrase "a period equal to that provided by the Discovery Clause".

"Provided" is defined in Webster as "furnished", and it is so defined in King vs. State, 30 Tex, Civ. A. 320, 70 S. W. 1019, 1921.

In People vs. Joyce, 246 Ill. 124, 92 N. E. 607. it is defined as "to fix; to establish as a previous condition; to determine; to settle."

"Equal", as used in the Statute, is defined by Webster, and in a number of decisions, as being in just proportion.

In Fechteler vs. Palm, 133 F. 462, at 471, it is defined [142] as "measured or estimated by".

Now, unless a clause existed, then a period could not be furnished or fixed by it. These words refer to expressed things—not to those which are implied. —and therefore the full context of the paragraph under scrutiny shows that the parties contracted to have the exception effectual only in the event a Dis-

covery Clause was expressed in the primary policy.

We submit that under the decisions above quoted, and particularly Cal. Ref. Co. vs. Prod. Ref. Co., 25 Cal. App. (2d) 104, (76 Pac. (2d) 533), the Court is without power to imply the existence of something which the parties contracted would only be effective in the event that period was expressed, but if the Court had such power, what implied provision could it insert? Could it provide a Discovery Clause? If so, what would it provide? One month, three months, six months, one year, two years, or what? In any event the implication of any term by the Court would have the effect not of construing the contract, but of making a new contract for the parties.

Finally, we believe that the paragraph under scrutiny in the instant case is analogous to a constitutional provision which is not self-executing, but requires an enabling act to give it force and effect. Obviously, the exception does not ex proprio vigore enlarge the discovery period. That period would be enlarged only in case the primary policy provided a discovery period. Provided how? By construction? No. By general terms of the primary policy? No. By limitation of three years? No. By the Statute of Limitations? No. It would have to be provided, or as we have said, "furnished", by an express Discovery Clause contained in the primary policy, and since none existed, then the provisions of the exception never became operative or effectual, and the

provisions of the main clause remained and continued controlling, and the discovery would have to be made during the currency of the excess policy. [143]

We mention one other feature purely out of an abundance of precaution, for it may be contended that the reference to a Discovery Clause in effect referred merely to the Statute of Limitations. If such a contention is made, we submit it is supported by neither reason nor authority. It has been definitely held that the Statute of Limitation is not the same thing as, but is separate and distinct from, Discovery Clauses.

American Employers' Ins. Co. vs. Roundup Coal Mining Co., 73 F. (2d) 592;

Ballard vs. U. S. Fidelity and Guaranty Co., 150 Ky. 236, 150 S. W. 1.

But even aside from these decisions, it is obvious that this paragraph does not state, either expressly or impliedly, literally or in effect, that they shall have a discovery period "as provided by law", or in accordance with the Statute of Limitations. It says only that they shall have such period as is provided in the Discovery Clause of the primary policy.

We respectfully submit that the period of discovery for the losses of plaintiff under Lloyds express policy, ceased at the expiration of that policy, to-wit, November 1, 1937, and that since the discovery of the loss was not made during its currency, the plaintiff is only entitled to judgment against the U. S. F.

& G. under its continuity or superseded suretyship rider.

Respectfully submitted,
CHAS. E. R. FULCHER
Attorney for Defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 [144]

Received copy of the within Memorandum of Facts, this 8th day of April, 1942.

FARRAND & FARRAND,
By STEPHEN M. FARRAND
(Attorneys for Plaintiff)
MILLS & WOOD,
By EDWARD C. MILLS
N. P.
(Attorneys for Defendant, United States Fidelity and Guaranty Company)

[Endorsed]: Filed Apr. 10, 1942. [145]

At a stated term, to wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los An-

geles on Wednesday, the 15th day of April, in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1447-H Civil

[Title of Cause.]

This cause coming on for trial; Ross C. Fisher, Esq., appearing as counsel for the plaintiff; Chas. E. R. Fulcher, Esq., appearing as counsel for Underwriting Members, etc., and Stanley Graham Beer, etc., Edw. C. Mills, Esq., appearing as counsel for U. S. Fidelity & Guaranty Co., and John Q. Bybee, Court Reporter, being present and reporting the proceedings; at 10:15 A.M. both sides answering ready.

Counsel stipulate re various facts including the fact that there is due and owing to plaintiff $22,-019.22 less $1,000.00 heretofore paid by U. S. Fidelity & Guaranty Co., and the issue before the Court is the question as to whether defendant U. S. Fidelity & Guaranty Co., or defendant Underwriting Members of Lloyd's, etc., is liable for the aforementioned amount and Attorney Fisher makes a statement re plaintiff's position.

At 11 A.M. court recesses. At 11:10 A.M. court reconvenes.

Attorney Fulcher argues to the Court on behalf of defendants Underwriting Members of Lloyd's, etc., and Stanley Graham Beer, etc.

At 12.05 P.M. court recesses to 2 P.M. At 2.05 P.M. court reconvenes.

Attorney Fulcher resumes argument on behalf of his clients. Attorney Mills argues on behalf of defendant U. S. Fidelity & Guaranty Co. Attorney Fulcher argues further.

At 3.40 P.M. court recesses. At 3.50 P.M. court reconvenes. Attorney Fulcher argues further. Attorney Mills makes a statement. The Court suggests that a transcript be filed on certain parts of the argument.

It is ordered that the cause be, and it hereby is, continued to May 20, 1942, at 10 A.M. for further trial.

At 4:30 P.M. court adjourns. **[146]**

At a stated term, to wit: The February Term, A.D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 20th day of April, in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1447-H Civil

[Title of Cause.]

This cause coming on for further trial; Ross C. Fisher, Esq., appearing as counsel for the plaintiff;

Chas. E. R. Fulcher, Esq., appearing as counsel for Underwriting Members, etc., and Stanley Graham Beer, etc., Edw. C. Mills, Esq., appearing as counsel for U. S. Fidelity & Guaranty Co., John Q. Bybee, Court Reporter, being present and reporting the proceedings:

It is ordered that a written stipulation be filed to cover oral stipulations heretofore made.

Attorney Mills argues in behalf of his client.

Pursuant to stipulation Findings are waived, and it is ordered that the cause be, and it hereby is, continued to April 27, 1942, at 10 A.M. for submission. [147]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated by and between plaintiff and defendants, Underwriting Members of Lloyd's in Lloyd's Policy No. 54342 and Stanley Graham Beer, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy No. 54342, and by and between plaintiff and defendant United States Fidelity and Guaranty Company, a corporation, as follows:

1. (a) Whenever in this stipulation reference is made to "Primary Bond", it shall be deemed to refer to that certain bond issued by defendant

United States Fidelity and Guaranty Company to plaintiff under date of October 23, 1912, being Bond No. 603-12, a copy of which bond is attached to plaintiff's complaint as Exhibit "A". [148]

(d) Whenever in this stipulation reference is made to "1937 bond", it shall be deemed to refer to that certain excess commercial blanket bond issued by defendant United States Fidelity and Guaranty Company to plaintiff, being bond No. 02-308-37 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is attached to plaintiff's complaint as Exhibit "D". Whenever in this stiplation reference is made to "1938 bond", it shall be deemed to refer to that certain excess commercial blanket bond issued by defendant United States Fidelity and Guaranty Company to plaintiff, being bond No. 14815-02-313-38 as amended and modified by certain written riders attached thereto, a copy of which bond and riders is attached to plaintiff's complaint as amended as Exhibit "E". Said 1937 bond and said 1938 bond are sometimes herein collectively referred to as "excess bonds".

(c) Whenever in this stipulation reference is made to "Lloyd's", it shall be deemed to refer to defendant Underwriting Members of Lloyd's in Lloyd's Policy No. 54342.

(d) Whenever in this stipulation reference is made to "Lloyd's Excess Policy", it shall be deemed to refer to the Certificate of Insurance and the Policy of Insurance, copies of which are set

forth as Exhibits "B" and "C", respectively, to plaintiff's complaint.

(e) Whenever in this stipulation reference is made to "Audit Report", it shall be deemed to refer to the audit report of Fuller, Eadie & Payne dated October 28, 1940, addressed to plaintiff.

2. This stipulation supplements the Stipulation As To Certain Facts between plaintiff and defendants Lloyd's and Stanley Graham Beer, individually, and as representative of Lloyd's, dated January 6, 1942, filed herein March 20, 1942, and the Stipulation As To Certain Facts between plaintiff and defendant United States Fidelity and Guaranty Company, dated March 19, 1942, filed herein March 20, 1942. [149]

3. These stipulating defendants waive the introduction in evidence at the trial of the audit report of Fuller, Eadie and Payne, dated October 28, 1940, addressed to plaintiff and stipulate that the plaintiff suffered losses due to the defalcations of Floyd E. Jones occurring during the period from May 1, 1937 to and including November 1, 1937, aggregating the sum of $23,019.22. Defendants Lloyd's and Stanley Graham Beer, individually and as representative of Lloyd's, stipulate that if the court should determine that they are liable under Lloyd's excess policy for said loss, then the judgment to be entered by the court in favor of plaintiff and against them, and each of them, on account of the losses sustained by plaintiff as a result of the defalcations of said Floyd E. Jones occurring during

said period from May 1, 1937 to and including November 1, 1937, shall be the sum of $22,019.22. being the full amount of said losses less the sum of $1,000.00 heretofore paid plaintiff by defendant United States Fidelity and Guaranty Company under said primary bond. Defendant United States Fidelity and Guaranty Company stipulates that if the court should determine that it is liable under either said 1937 bond or said 1938 bond for said loss, then the judgment to be entered by the court in favor of plaintiff and against defendant United States Fidelity and Guaranty Company on account of losses sustained by plaintiff as a result of the defalcations of said Floyd E. Jones occurring during said period from May 1, 1937 to and including November 1, 1937, shall be in the sum of $22,019.22, being the full amount of said losses less the sum of $1,000.00 heretofore paid by defendant United States Fidelity and Guaranty Company under said primary bond.

4. Plaintiff's claim against defendants for losses sustained by plaintiff and arising out of the defalcations of said Floyd E. Jones occurring during the period from May 1, 1937 to and including November 1, 1937, shall be limited to said sum of $23,019.22 less the said sum of $1,000.00 heretofore paid on account [150] of said primary bond and plaintiff waives any claim which it might have on account of said losses in excess of said amount.

5. Defendants and each of them stipulate that on July 31, 1940, plaintiff discovered for the first time

that said Floyd E. Jones might not have accounted for all of the moneys received by him on plaintiff's behalf for fruit sold by him. Defendants and each of them further stipulate that plaintiff duly performed all of the conditions on its part to be performed under the primary bond, the Lloyd's excess policy, and under the 1937 and 1938 bond, and accordingly defendants and each of them admit the allegations of paragraph XIII of plaintiff's complaint.

6. On or about November 20, 1940 defendant United States Fidelity and Guaranty Company paid to plaintiff on account of the defalcations of said Floyd E. Jones during the year 1937 between May 1 and November 1, the total sum of $1,000.00 as the maximum amount of coverage as to the said defalcations under the said primary fidelity bond, and accordingly defendants and each of them admit the allegations contained in paragraph XIV of plaintiff's complaint.

7. These stipulating defendants stipulate and agree that plaintiff is entitled to recover for said losses in the amount set forth herein either against defendants Lloyd's and Stanley Graham Beer, individually, and as representative of Lloyd's, or against defendant United States Fidelity and Guaranty Company. Defendants Lloyd's and Stanley Graham Beer, individually, and as representative of Lloyd's, stipulate and agree that in the event the court should hold defendant United States Fidelity and Guaranty Company not to be liable under its

policies of excess insurance or either of them, that they will be liable to plaintiff in the amounts set forth herein, and that judgment may be entered herein in favor of plaintiff against defendants Lloyd's and Stanley Graham Beer, individually, and as repreesntative of Lloyd's, in the said sum of $22,019.22. Similarly defendant United States Fidelity and Guaranty Company stipulates and [151] agrees that in the event the court should hold defendants Lloyd's and Stanley Graham Beer, individually, and as representative of Lloyd's, not to be liable under its policy of excess insurance, that defendant United States Fidelity and Guaranty Company will be liable to plaintiff in the amounts set forth herein and that judgment may be entered herein in favor of plaintiff and against defendant United States Fidelity and Guaranty Company in the said sum of $22,019.22.

8. It is stipulated that it is to be legally inferred that at the time Lloyd's issued its excess policy Lloyd's was familiar with the terms and conditions of the primary bond, and similarly it is stipulated that it is to be legally inferred that at the time defendant United States Fidelity and Guaranty Company issued its 1937 and 1938 bonds and superseded suretyship riders attached thereto it was familiar with the terms and conditions of Lloyd's excess policy and the primary bond.

9. Findings of Fact and Conclusions of Law are hereby waived.

10. This stipulation is not to be construed as in

anywise constituting an admission, stipulation or agreement that these respective stipulating defendants are liable to plaintiff in any sum whatsoever under their respective policies of excess insurance, or otherwise, and that all defenses to such action are hereby expressly reserved except as provided in this stipulation or the stipulations which it supplements or in the pleadings heretofore filed herein.

11. Nothing contained herein shall be construed to prejudice or waive the right of any party hereto to appeal from or prosecute any appropriate proceeding to review any judgment or any part or portion thereof as may be entered herein. [152]

12. This supplemental stipulation as to certain facts together with the prior stipulations as to certain facts referred to in paragraph 2 hereof, constitute a stipulation as to all the facts at issue under the pleadings, and no evidence shall be introduced at the trial.

Dated this 23rd day of April, 1942.

FARRAND & FARRAND
Attorneys for Plaintiff.
CHAS. E. R. FULCHER
Attorneys for Defendant Underwriting Members of Lloyd's in Lloyd's Policy No. 54342 and Stanley Graham Beer, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy No. 54342.

MILLS & WOOD
By EDWARD C. MILLS
Attorneys for Defendant
United States Fidelity and
Guaranty Company.

[Endorsed]: Filed Apr. 23, 1942. [153]

At a stated term, to wit: The February Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 27th day of April, in the year of our Lord one thousand nine hundred and Forty-two.

Present:

The Honorable: Harry A. Hollzer, District Judge.

No. 1447-H Civil

[Title of Cause.]

This cause coming on for submission; Ross C. Fisher, Esq., appearing as counsel for the plaintiff:

It is ordered that the cause stand submitted. [155]

[Title of District Court and Cause.]

OPINION OF THE COURT

Memorandum of Conclusions, Judge Hollzer, July 14, 1942.

It appearing that the facts upon which this cause has been tried are not controverted and that the same have been set forth in a series of stipulations, that is to say, one stipulation entered into under date of January 6, 1942 between plaintiff and the defendant sued herein under the name of Underwriting Members of Lloyd's in Lloyd's Policy No. 52342, an unincorporated association and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, said defendants jointly being hereafter referred to as Lloyd's, also another stipulation entered into under date of March 19, 1942 between plaintiff and the co-defendant sued herein under the name of United States Fidelity and Guaranty Company, a corporation, hereinafter referred to as Fidelity Company, and also a third stipulation entered into under date of April 23, 1942, between plaintiff on the one hand and all of the defendants on the other hand, and that for the purpose of this decision only the facts herein recited need be considered. [156]

That during the period extending from a date prior to May 1, 1937 to a date subsequent to November 1, 1937, one Floyd E. Jones was employed as a loose fruit salesman by plaintiff, that throughout said period said Jones was scheduled as an employee

of plaintiff under the bonds hereinafter mentioned, that said bonds were executed in favor of plaintiff, some by defendant Fidelity Company and one by defendant Lloyd's, that copies of said several bonds are attached as exhibits either to the complaint or to the complaint as amended by stipulation, that one of said bonds was executed by Fidelity Company under date of October 23, 1912, the same having been continued in force ever since and being hereinafter referred to as the Primary Bond, that liability under said Primary Bond as to any defalcations of said Jones occurring prior to November 1, 1937 was limited to the sum of $1,000, that another bond was executed by Fidelity Company under date of November 15, 1937, the same being hereinafter referred to as said 1937 bond, that still another bond was executed by Fidelity Company under date of November 7, 1938, the same being hereinafter referred to as said 1938 bond, that likewise Lloyd's under date of November 1, 1936, issued to plaintiff a certain bond in the amount of $25,000, the same being hereinafter referred to as Lloyd's Excess Policy and consisting of the Certificate of Insurance and the Policy of Insurance, copies of which are attached to the complaint as Exhibits B and C, respectively.

That a copy of said Primary Bond, as modified from time to time by signed endorsements appended thereto, is attached to the complaint as Exhibit A, and that by said Primary Bond, as so modified, Fidelity Company guaranteed to pay to plaintiff any and all pecuniary losses of the character involved

herein and suffered during the period involved herein. [157]

That the purpose and effect of Lloyd's Excess Policy were to supplement said Primary Bond by extending the amount of coverage over and above the maximum liability under said Primary Bond to and not exceeding the sum of $25,000, and that said Lloyd's Excess Policy covered the period commencing November 1, 1936 and ending November 1, 1937.

That the purpose and effect of the aforementioned 1937 bond were to insure the fidelity of plaintiff's employees, (including said Jones) scheduled under said Primary Bond in the maximum sum of $25,000 over and above the amount of said Primary Bond in the maximum sum of $25,000 over and above the amount of said Primary Bond, and to cover, among other things, any misconduct of such employees occurring during the period of said Lloyd's Excess Policy, for which a right of recovery against Lloyd's under the latter's policy might be lost because of non-discovery of the defalcation and because of lapse of time.

That the purpose and effect of said 1938 bond were to insure the fidelity of plaintiff's employees (including said Jones), scheduled under said Primary Bond in the maximum sum of $25,000 over and above the amount of said Primary bond, and to cover, among other things, any misconduct of such employees during the period of Lloyd's Excess Policy, for which a right of recovery against Lloyd's under the latter's policy and against Fidelity Company

under its 1937 bond might be lost because of non-discovery of the defalcation and lapse of time.

That losses were sustained by plaintiff as the result of defalcations of said Jones during the period from May 1, 1937 to November 1, 1937, and that these losses were of such a nature as would be covered by said Primary Bond, also by said 1937 bond, also by said 1938 bond, and also by Lloyd's Excess Policy, if the court should determine that Lloyd's [158] is liable for any losses sustained by plaintiff under Lloyd's Excess Policy.

That plaintiff has been paid the sum of $1,000 by Fidelity Company in discharge of the latter's liability under said Primary Bond for the period covered by Lloyd's Excess Policy, and that in addition, plaintiff has been paid by Fidelity Company the further sum of $2,000, the same constituting the balance of Fidelity Company's Liability for losses due to the defalcations of said Jones occurring subsequent to November 1, 1937.

That the total losses suffered by plaintiff as a result of the defalcations of said Jones occurring during the period from May 1, 1937 to and including November 1, 1937, aggregate the sum of $23,019.22, that on July 31, 1940 plaintiff for the first time discovered that said Jones might not have accounted for all of the monies received by him on plaintiff's behalf for fruit sold by him, and that plaintiff has duly performed each and all of the conditions of the several bonds sued upon herein.

That Lloyd's admits that at the time of issuing its

said Excess Policy it was familiar with the terms and conditions of said Primary Bond, and likewise Fidelity Company admits that at the time of issuing its said 1937 bond and its said 1938 bond and the superseded suretyship riders attached thereto it was familiar with the terms and conditions of Lloyd's Excess Policy as well as said Primary Bond.

That Lloyd's Excess Policy contained among other provisions, a certain paragraph numbered 5 therein and reading as follows, to-wit: [159]

> "Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance."

That said Lloyd's Excess Policy was not renewed at its expiration date on November 1, 1937, but on said date Fidelity Company issued to plaintiff said 1937 bond which contained, among other provisions the following clauses, to-wit:

> "Whereas, Lloyds issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective the First day of November, 1936, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and in favor of the Employer; and
>
> "Whereas, the prior bond, as of the effective

date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

"Now, Therefore, it is hereby understood and agreed as follows:

"1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the [160] discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date."

That preliminary to the execution of its said Excess Policy and under date of November 1, 1936, Lloyd's issued to plaintiff a certain certificate of insurance which contained a recital to the effect that such insurance was issued in the amount of $25,000 over and above Primary Limit of approximately $972,000 on United States Fidelity and Guaranty Company Bond No. 14815-03-62-12 (the same being referred to as said Primary Bonds in Lloyd's Excess Policy).

That the respective defendants have stipulated to

the effect that plaintiff is entitled to recover judgment for said losses in the amount of $22,019.22, that it is say, Lloyd's has stipulated to the effect that if the court should hold its co-defendant not to be liable under any of the policies sued upon herein, then judgment may be entered in favor of plaintiff and against Lloyd's in the amount last stated, and Fidelity Company has stipulated to the effect that in the event the court should hold Lloyd's not to be liable under the latter's Excess Policy, then judgment may be entered in favor of plaintiff and against Fidelity Company in the amount last stated. [161]

It further appearing that Lloyd's contends that it is not liable herein, because the losses here involved were discovered by plaintiff on July 31, 1940, that is to say, were discovered not during the currency of its Excess Policy but after the expiration thereof, also because said Primary Bonds contained no Discovery Clause, hence the right of discovery ceased upon the expiration of its Excess Policy, and therefore the concluding clause of the aforementioned paragraph numbered 5 never became operative or effective and must be treated as surplusage, in other words, that Lloyd's can be held liable under its said Excess Policy only for such losses as were discovered during its currency, and that such limitation or restriction is due to the fact that the Primary Bonds issued by Fidelity Company contained no express Discovery Clause.

It further appearing that Lloyd's also contends

that the purpose of the above quoted Continuity Rider, attached to said 1937 bond issued by Fidelity Company, was to pick up any losses occurring during the currency of said Lloyd's Excess Policy, but not discovered within the time limited in the latter policy for the discovery thereof, and since the time for the discovery of losses under the latter policy was limited to the period of its currency, and since the losses involved herein were not discovered until after the expiration of said period, the Fidelity Company has become liable therefor, and plaintiff is entitled to judgment against it for the amount previously stated.

It further appearing that Fidelity Company contends that the term "Discovery Clause", as used in the aforementioned paragraph numbered 5 in said Lloyd's Excess Policy, [162] was not intended to be and should not be limited to a specific clause in a Primary Bond providing for discovery, but that said term was intended to refer to and does mean merely the period of time in which under such Primary Bond losses must be discovered in order to be recoverable thereunder, and that in the absence of specific limitation there is no definite time limit for discovery under such Primary Bond, that is to say, that the only limitation is the time prescribed by the applicable statute of limitations for commencing suit upon a written instrument," (but not exceeding three years)".

It further appearing that Fidelity Company also contends that since in the instant case there is an

absence of specific limitation fixing a definite time limit for discovery of losses under the applicable Primary Bond the assured (plaintiff) would be entitled to recover under such Primary Bond for losses occurring during its currency and discovered within the period prescribed by the California Statute of Limitations for commencing suit upon a written instrument, "(but not exceeding three years)".

The Court Concludes that in conformity with the fundamental rules of construction, every clause, every phrase, and every distinct provision in the policies sued upon herein should be given meaning and effect; that such meaning must be given, if possible, as will permit the particular policy involved to stand and leave no part useless, or deprived of all sense and meaning; that words should never be considered unnecessary and surplusage, if a reasonable construction can be adopted which will give force to and preserve all of the terms of such policy; that any construction should be avoided which implies that the party drawing the policy was ignorant of the meaning of the [163] language employed, or that he used words in vain, the legal intendment being that each and every word or clause was inserted for some useful and sensible purpose, and that when rightly understood it may have some practical operation.

The Court Further Concludes that Lloyd's issued its said Excess Policy with express and specific reference to the applicable Primary Bond issued by

Fidelity Company, and expressly agreed that because of the non-renewal of its Excess Policy the assured (plaintiff) should have additional time after the expiration thereof, "in which to discover losses claimable under this" Excess Policy, that is to say, additional time equivalent to the time within which plaintiff was allowed to discover losses and recover therefor under the applicable Primary Bond, but not exceeding three years.

The Court Further Concludes that because of the absence of any specific limitation fixing the time for discovery of losses under the applicable "Primary Bond", and in order to give a reasonable and appropriate meaning to the concluding clause of the above quoted Paragraph numbered 5 in said Lloyd's Excess Policy, and in order to avoid giving to such concluding clause a construction which would imply that the party drawing the same was ignorant of the meaning of the language employed, and in order to avoid leaving such concluding clause meaningless and useless, said Paragraph numbered 5 must be construed as entitling plaintiff to recover from defendant Lloyd's for losses occurring during the currency of its said Excess Policy and discovered with three years thereof.

The Court Further Concludes that plaintiff is entitled to judgment in the sum of $22,019.22, from defendant Lloyd's.

[Endorsed]: Filed Jul. 14, 1942. [164]

At a stated term, to wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 14th day of July, in the year of our Lord one thousand nine hundred and Forty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 1447-H Civil

[Title of Cause.]

For the reasons set forth in the Memorandum of Conclusions this day filed, and it appearing that Findings of Fact and Conclusions of Law have been waived herein, it is ordered that counsel for the plaintiff prepare and submit the form of judgment herein, serving a copy on counsel for the other parties.

At 12.30 P.M. court adjourns. [165]

In the District Court of the United States
Southern District of California
Central Division

Civil No. 1447-H

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation,

Plaintiff,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342; and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Defendants.

JUDGMENT

This action came on regularly for trial on the 15th day of April, 1942, and was tried on April 15, 1942, April 20, 1942 and April 27, 1942, before the court sitting without a jury, the Honorable Harry A. Hollzer, Judge presiding; Messrs. Farrand & Farrand, appearing by Ross C. Fisher, Esq., of said firm, appeared as attorneys for plaintiff, and Messrs. Mills & Woods, appearing by Edward C. Mills, Esq., of said firm appeared as attorneys for defendant, United States Fidelity and Guar-

anty Company, a corporation; Chas. E. R. Fulcher, Esq., appeared as attorney for defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members [166] of Lloyd's in Lloyd's Policy Number 52342. The facts were stipulated to by written stipulations of facts heretofore filed herein, and the cause having been submitted to the court upon the pleadings herein and said written stipulations, and the court having duly considered the pleadings and stipulations on file herein, and findings of fact and conclusions of law having been waived by said stipulations, and the court having rendered on May 14, 1942, its memorandum decision herein, and the court being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed that plaintiff have judgment against defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52432, for the sum of $22,019.22, and for plaintiff's costs incurred herein, hereby taxed in the sum of $22.14, and for reporter's fees in the sum of $12.40; together with interest on said judgment from the date of this judgment at the rate of seven per cent per annum;

It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing by reason of this action against defendant United States Fidelity and Guar-

anty Company, a corporation; provided, however, that in the event defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, shall appeal from this judgment and if it shall be finally determined that plaintiff is not entitled to recover from defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, then plaintiff shall have and recover from defendant United States Fidelity and Guaranty Company, a corporation, the sum of $22,019.22, [167] together with interest thereon from the date of this judgment at the rate of seven per cent per annum, and together with plaintiff's costs herein incurred.

Dated this 31 day of August, 1942.

H. A. HOLLZER

Judge

Approved as to form:

FARRAND & FARRAND
Attorneys for Plaintiff

CHAS. E. R. FULCHER
Attorney for defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342.

MILLS & WOOD
By EDWARD C. MILLS
Attorneys for defendant United States Fidelity and Guaranty Company, a corporation.

Judgment entered Aug. 31, 1942.
Docketed Aug. 31, 1942.
C. O. Book 11, Page 10.

EDMUND L. SMITH,
Clerk,
By L. WAYNE THOMAS
Deputy.

[Endorsed]: Filed Aug. 31, 1942. [168]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342; and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, do hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain judgment in favor of the plaintiff, California Fruit Growers Exchange, a corporation, and against the defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, which judgment was entered on August 31, 1942, and from the whole [170] thereof.

Dated this 9th day of September, 1942.

CHAS. E. R. FULCHER

Attorney for defendants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342; and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342. [171]

[Endorsed]: Filed Sep. 9, 1942.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 191, inclusive, contain full, true and correct copies of: Complaint; Summons; Motion and Order Amending Complaint; Amendment to Complaint; Answer of United States Fidelity and Guaranty Company; Answer of Underwriting Members of Lloyd's, etc., et al.; Stipulation and Order Amending Complaint; Notice of Filing Stipulation and Order Amending Complaint; Amended Answer of United States Fidelity and Guaranty Company; Answer of Underwriting Members of Lloyd's, etc., et al. to Amendment to Complaint; Stipulations (two) as to Certain Facts; Order entered March 25, 1942; Plaintiff's Memorandum of Facts and Issues of Law; Memorandum of Facts and Issues of Law of Defendant United States Fidelity and Guaranty Company; Memorandum of Facts and Issues of Law of Defendants Underwriting Members of Lloyd's, etc., et al.; Minutes of Proceedings entered April 15, 1942; Minutes of Proceedings entered April 20, 1942; Supplemental Stipulation of Facts; Minutes of Proceedings entered April 27, 1942; Opinion of the Court; Order for Judgment; Judgment; Notice of Appeal; Statement of Points Upon Which Appellants Intend to Rely on Appeal; Stipulation and Order Fixing Supersedeas Bond on Appeal; Super-

sedeas Bond on Appeal; Appellants' Designation of Contents of Record on Appeal; Designation of Additional Contents of Record on Appeal by United States Fidelity and Guaranty Company; Designation of Additional Contents of Record on Appeal by California Fruit Growers Exchange; which documents constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the Clerk's fee for comparing, correcting, typing and certifying the foregoing record amounts to $73.25, which fee has been paid to me by the Appellants.

Witness my hand and the seal of said District Court, this 13th day of October, A. D. 1942.

[Seal] EDMUND L. SMITH,
Clerk
By THEODORE HOCKE
Deputy Clerk.

[Endorsed]: No. 10287. United States Circuit Court of Appeals for the Ninth Circuit. Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, Appellants, vs. California Fruit Growers Exchange, a corporation, and United States Fidelity and Guaranty Company, a corporation, Appellees. Transcript of Record. Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 14, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10287

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation,

Plaintiff and Appellee,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant and Appellee.

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342; and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Defendants and Appellants.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

Come now the defendants and appellants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342; and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and herewith make their statement of the

points upon which they intend to rely on appeal herein:

(1) The trial Court erred as a matter of law, in giving judgment for the plaintiff and appellee in any sum whatsoever as against these appealing defendants and appellants;

(2) The Trial Court erred in deciding that since the primary bond contained no discovery clause, the plaintiff and appellee had up to, but not exceeding, three (3) years, within which to discover losses occurring during the currency of the excess bond executed by these appealing defendants and appellants;

(3) The Trial Court erred as a matter of law, in its interpretation of the terms and conditions of the bonds written by the respective defendants, and in deciding that these appealing defendants and appellants were liable for plaintiff's and appellee's losses;

(4) The Trial Court erred as a matter of law, in deciding that these appealing defendants and appellants were liable under the bond executed by them, for losses discovered after the expiration date of the bond executed by these appealing defendants and appellants;

(5) The Trial Court erred as a matter of law, in determining that the losses suffered by plaintiff and appellee were not within the terms and conditions of the bonds written by the defendant and appellee, United States Fidelity and Guaranty Com-

pany, or under its superseded suretyship riders attached to said bonds;

(6) The Trial Court erred in deciding that plaintiff's and appellee's losses were discovered within the time provided for the discovery of such losses under the excess bond executed by these appealing defendants and appellants;

(7) The Trial Court erred in the interpretation of the provision of the bond executed by these appealing defendants and appellants, in that it in effect rewrote and read into such bond terms and conditions which were non-existent therein;

(8) Under the terms and conditions of the excess bond executed by these appealing defendants and appellants, plaintiff and appellee was not entitled to recover any sum whatsoever, for the reason that the loss was not discovered within the time provided for in said bond so executed by these appealing defendants and appellants.

Dated this 14th day of October, 1942.

CHAS. E. R. FULCHER,

Attorney for defendants and appellants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342.

Receipt of a copy of the within is hereby acknowledged this 14th day of October, 1942.

FARRAND & FARRAND,
By R. M. C. FISHER,
(Attorneys for Plaintiff and Appellee)

Service of the within and receipt of a copy thereof is hereby admitted this 14th day of October, 1942.

MILLS & WOOD,
By M. H.
(Attorneys for Defendant and Appellee)

[Endorsed]: Filed Oct. 15, 1942.

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

OPENING BRIEF OF APPELLANTS.

CHAS. E. R. FULCHER,
823 Title Guarantee Building, Los Angeles,
Attorney for Appellants.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

MISCELLANEOUS.

STATUTES.

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

OPENING BRIEF OF APPELLANTS.

Come now the appellants, and respectfully submit herewith their opening brief.

Statement of Pleadings, Facts and Statutory Provisions Showing Jurisdiction of the District Court and the Circuit Court of Appeals.

This is an action instituted by the plaintiff and appellee, California Fruit Growers Exchange (hereinafter for brevity called "Fruit Growers"), upon a complaint [Tr. pp. 2 to 65, incl.], seeking a recovery of $25,000.00 from

defendant and appellee, United States Fidelity and Guaranty Company (hereinafter for brevity called "U. S. F. & G."), or defendants and appellants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 (hereinafter for brevity called "Lloyd's").

The complaint alleges [Tr. pp. 2, 3 and 4], that Fruit Growers was and now is a non-profit co-operative agricultural marketing corporation, organized and existing under the co-operative marketing laws of the State of California, with its principal place of business in Los Angeles, Los Angeles County, California, and that it is a citizen of that state; that U. S. F. & G. was and is a corporation organized and existing under the laws of the State of Maryland, and a citizen of that state; that all the defendant Underwriting Members of Lloyd's are non-residents of the State of California, and are residents of England and citizens of Great Britain; that Stanley Graham Beer is a resident of England and a citizen of Great Britain; that the matter at suit, exclusive of interest and costs, exceeds the sum of $3000.00, and is the sum of $25,000.00.

The answer of Lloyd's [Tr. p. 82], and the answer of U. S. F. & G. [Tr. p. 69], each admit all these allegations.

The jurisdiction of the District Court was not an issue in the case.

All the facts in the case were stipulated to. No additional evidence was introduced.

The action was one at common law for the recovery of $25,000.00 under written contracts, to-wit, fidelity bonds, executed by U. S. F. & G. and Lloyd's to Fruit Growers. [Tr. pp. 4 to 68, incl.]

The statutory provisions which sustain the jurisdiction of the District Court are as follows:

28 U. S. C. A. 41 provides that the District Court shall have original jurisdiction as follows:

> "First: Of all suits of a civil nature at common law or in equity, brought by the United States, * * * or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and (a) arises under the Constitution or laws of the United States, * * * or (b) is between citizens of different states, or (c) is between citizens of a State and foreign States, citizens or subjects."

The statutory provisions which sustain jurisdiction of the Circuit Court of Appeals to review the judgment in question, are found in 28 U. S. C. A. 225, and read as follows:

> "(a) Review of decisions. The Circuit Courts of Appeal shall have appellate jurisdiction to review, by appeal or writ of error, final decisions—First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under Section 345 of this title."

The instant case does not fall within the provision authorizing or requiring an appeal to the Supreme Court under 28 U. S. C. A. 345.

Statement of the Facts and the Case.

There is no conflict involved in this action. Every fact not admitted by the pleadings, was stipulated by the parties in writing.

The stipulations appear in the transcript, at pages 128, 134 and 186, the supplemental stipulation providing as follows:

> "12. This supplemental stipulation as to certain facts together with the prior stipulations as to certain facts referred to in paragraph 2 hereof, constitute a stipulation as to all the facts at issue under the pleadings, and no evidence shall be introduced at the trial."

From May 1, 1937, to a date subsequent to November 1, 1937, one Floyd E. Jones was employed by Fruit Growers as a loose fruit salesman, and was scheduled as such under the Primary Bond hereinafter referred to.

From May 1, 1937, to November 1, 1937, Fruit Growers lost, through the dishonesty and defalcations of the said Jones (all of which acts came within the provisions of the Primary Bond), the sum of $23,019.22. The liability of the surety on the Primary Bond was limited to $1000.00, which was paid, leaving a balance of $22,019.22 unpaid.

Excess Bonds had been executed by both Lloyd's and U. S. F. & G., with limits of $25,000.00 each, in excess of the $1000.00 above mentioned. These bonds are hereafter referred to and discussed at length.

It was stipulated that the acts of Jones came within the provisions of these Excess Bonds, and that the amount of the loss was correct, leaving open for determination

the sole question of whether Lloyd's or U. S. F. & G. was liable for such excess of $22,019.22 under the provisions of their respective bonds and the riders attached thereto.

The District Court determined that Lloyd's was liable therefor, and gave judgment against it for $22,019.22, but provided in said judgment as follows:

> "It is Further Ordered, Adjudged and Decreed that plaintiff take nothing by reason of this action against defendant United States Fidelity and Guaranty Company, a corporation; provided, however, that in the event defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, shall appeal from this judgment and if it shall be finally determined that plaintiff is not entitled to recover from defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, then plaintiff shall have and recover from defendant United States Fidelity and Guaranty Company, a corporation, the sum of $22,019.22, together with interest thereon from the date of this judgment at the rate of seven per cent per annum, and together with plaintiff's costs herein incurred."

It was further stipulated that the loss involved herein was discovered by plaintiff on July 31, 1940. [Tr. pp. 189 to 190.]

On October 23, 1912, U. S. F. & G. executed and delivered to Fruit Growers its Primary Fidelity Bond, guar-

anteeing to pay to it any pecuniary loss occasioned by acts of fraud, dishonesty, etc., of certain listed employees of Fruit Growers. This bond since that date has at all times continued to remain in full force and effect. It is set out in full in the transcript, at pages 13 to 25.

The limit of liability under said bond, as to the employee here involved, was $1000.00. This bond at no time contained a "Discovery Clause"; that is, a provision limiting the time within which the loss must be discovered by the obligee in order to recover under the bond from U. S. F. & G. for the defalcation.

On November 1, 1936, Lloyd's, through their agents, Swett & Crawford, issued to Fruit Growers a "Certificate of Insurance", which certified that Fruit Growers had procured insurance as therein set out, to-wit, the insurance covered by an Excess Blanket Fidelity Bond, on the terms and conditions mentioned in said certificate, and that said certificate should furnish evidence of the procuration thereof. [Tr. pp. 26 to 33.]

The bond, of which this was evidence, gave coverage up to $25,000.00 in excess of the limits of the Primary Bond, where liability existed on such Primary Bond, subject to the terms and conditions therein contained. This certificate (sometimes called a binder), was issued so that the assured might have evidence of its excess coverage until the formal bond, which was to be issued in London, England, should arrive, at which time the bond would supersede it. [Tr. p. 29.]

This bond was effective from November 1, 1936, to November 1, 1937.

As of November 1, 1936, the formal bond was issued by Lloyd's, and at some date delivered to Fruit Growers. It appears in full in the transcript, at pages 34 to 44.

The bond contained the same provisions as the certificate.

As of November 1, 1937, U. S. F. & G. executed and delivered its Excess Commercial Blanket Bond to Fruit Growers, with limits of $25,000.00 over the Primary Bond of $1000.00, covering the defalcations of Fruit Growers' employees. This bond appears in the transcript, at pages 45 to 64.

This bond was in effect from November 1, 1937, to November 1, 1938, and is hereafter called "U. S. F. & G.'s 1937 Excess Bond".

As of November 1, 1938 [Tr. p. 93], U. S. F. & G. executed and delivered to Fruit Growers its Excess Commercial Blanket Bond, with limits of $25,000.00 over the Primary Bond of $1000.00, covering the defalcations of Fruit Growers' employees. This bond appears in the transcript, at pages 91 to 121. It was substantially the same as the U. S. F. & G.'s 1937 Excess Bond, except as to its effective date, and it is hereafter called "U. S. F. & G's 1938 Excess Bond".

The Controversy, and How It Arose.

There was and is no controversy over the right of Fruit Growers to recover the full sum of $22,019.22. The only controversy which arose or which now exists is, whether U. S. F. & G. is liable therefor, or whether that liability falls upon Lloyd's. This controversy arises in the following manner:

On January 28, 1938, there was executed, attached to and made a part of U. S. F. & G.'s 1937 Excess Bond a rider [Tr. pp. 62 to 64], sometimes called in the insurance profession a "Superseded Suretyship Rider", or a "Continuity Rider", and since it is of vital importance we print it herewith in full, as follows:

"United States Fidelity and Guaranty Company
Baltimore, Maryland

RIDER

No. 02-308-37 $.....

To be attached to and form a part of Excess Commercial Blanket Bond, (Standard Form AA) No. 14815-02-308-37, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-five Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, *et al* (hereinafter called Employer), and dated the 1st day of November, 1937.

Whereas, Lloyds issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective the First day of November, 1936, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and in favor of the Employer; and

Whereas, the prior bond, as of the effective date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations,

any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under the attached bond and the attached bond as extended by this rider, or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller.

4. That any sum or sums which shall be paid under the attached bond as extended by this rider on account of any loss or losses under the prior bond shall reduce or be deducted from the amount of the attached bond in the same manner and subject to the same conditions and limitations as payments under the attached bond, but any sum so reducing or de-

ducted from the amount of the attached bond shall be restored thereto as therein provided.

Signed, sealed and dated this 12th day of January, 1938.

United States Fidelity and
Guaranty Company
J. St. Paul White
Attorney-in-fact

Accepted:

California Fruit Growers
Exchange
By (Illegible)
Asst. Secretary.

(Endorsed): Filed Mar. 12, 1941."

[Tr. pp. 62 to 64.]

This rider, being a part of U. S. F. & G.'s 1937 Excess Bond, was effective until November 1, 1938, at which time the bond itself terminated or was cancelled.

The U. S. F. & G.'s 1938 Excess Bond contained an exactly similar rider [Tr. p. 112], except that in the premise it recites the execution and termination or cancellation of the U. S. F. & G.'s 1937 Excess Bond, whereas the rider attached to the U. S. F. & G.'s 1937 Excess Bond recites the execution and termination or cancellation of Lloyd's Excess Bond.

From these riders it will be seen that U. S. F. & G. was to be liable for losses occurring during the *currency* of the Lloyd's Excess Bond, but which were not *discovered* within the time limited for the discovery thereof by the provisions of the Lloyd's Bond.

These riders gave the assured continuous coverage, regardless of the date of discovery, from which comes the term "Continuity Rider", or "Superseded Suretyship Rider".

Lloyd's contended that U. S. F. & G. was liable for the loss, by reason of these riders, and the fact that under the provisions of Lloyd's Bond liability ceased simultaneously with the termination of its Excess Bond, for all losses not *discovered* prior to that time, since the Primary Bond contained no Discovery Clause.

U. S. F. & G. contended that since the Primary Bond contained no Discovery Clause, Lloyd's was liable for all losses occurring during its currency, and discovered at any time prior to the expiration of three years after the expiration and non-renewal of Lloyd's Bond.

The correctness of the respective contentions depends, in addition to the matters already stated, upon the proper construction of the clause contained in both the Lloyd's Certificate of Insurance [Tr. p. 29], and the Bond [Tr. p. 38], which provided as follows:

> "5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance."

Specifications of Error.

In legal strictness there is but one error complained of herein. This error may be stated in two ways, or in either one of two ways, as follows:

I.

The decision and judgment against Lloyd's are against law.

II.

The evidence is insufficient to sustain the decision and judgment as against Lloyd's.

As incidents of these fundamental propositions, the errors of the Court consist of the following:

III.

The trial court erred in construing the bonds of U. S. F. & G. and Lloyd's, so as to render execution and issuance of U. S. F. & G.'s Superseded Suretyship Rider ineffectual, meaningless and useless.

IV.

The trial court erred in not applying to said documents the rule of contemporaneous construction, in view of the construction placed thereon by all the parties to this action.

V.

The trial court erred in not applying to Lloyd's policy the rule that the parties are presumed to have been familiar with the rules of grammar, and used apt and well-chosen words to express themselves.

VI.

The trial court erred in interpreting Lloyd's contract so as to render ineffectual a portion of the language expressed therein.

VII.

The trial court erred in, in effect, reading into Lloyd's contract language which was not contained therein, when the terms of the contract were clear and explicit.

ARGUMENT.

I.

It Is a Cardinal Rule of Construction, That Where Two Constructions Can Be Placed Upon Documents, One of Which Will Render the Instrument Valid and Effectual, and the Other Render It Void, Useless and Meaningless, the Former Construction Will Be Adopted and the Latter Rejected. To Hold Lloyd's Liable for the Loss in the Instant Case, Would Be to Hold That U. S. F. & G. Executed, for a Consideration, a Useless Paper, and Its Acts in So Doing Were Useless and Meaningless.

In order to follow the argument, we believe it will be helpful to the Court to restate as tersely as clarity will permit, a few pertinent dates and the subjects to which they relate. They are as follows:

(1) October 23, 1912, U. S. F. & G. issued its Primary Bond;

(2) November 1, 1936, Lloyd's issued its Certificate of Excess Insurance;

(3) As of November 1, 1936, Lloyd's issued its Policy of Excess Insurance;

(4) November 1, 1937, Lloyd's Excess Policy expired by its own terms, it having never been renewed;

(5) November 1, 1937, U. S. F. & G. issued its 1937 Excess Bond;

(6) January 28, 1938, U. S. F. & G. executed and attached to the 1937 Bond its Superseded Suretyship Rider;

(7) November 1, 1938, U. S. F. & G. issued its 1938 Excess Bond with Superseded Suretyship Rider attached;

(8) The loss *occurred* between May 1, 1937, and November 1, 1937;

(9) The loss was *discovered* on July 31, 1940.

From the foregoing it will be seen that the loss occurred during the time Lloyd's policy was in force, but was not discovered until two years and eight months thereafter.

Let us first take up the consideration of the U. S. F. & G.'s Superseded Suretyship Rider and examine it in the light of all the facts in the case.

What was the purpose of the execution of this rider? In determining this question it should be borne in mind that the bond to which it was attached as a rider, was effectual only from November 1, 1937, to November 1, 1938.

Being an instrument in writing, a consideration therefor is presumed.

Next, we must bear in mind that U. S. F. & G. was familiar with the terms and conditions of Lloyd's Bond. No doubt can exist upon this subject, since it was stipulated between the parties that such must be legally inferred, the stipulation in this particular reading as follows, to-wit [Tr. p. 191]:

> "8. It is stipulated that it is to be legally inferred that at the time Lloyd's issued its excess policy Lloyd's was familiar with the terms and conditions of the primary bond, *and similarly it is stipulated that it is to be legally inferred that at the time defendant*

United States Fidelity and Guaranty Company issued its 1937 and 1938 bonds and superseded suretyship riders attached thereto it was familiar with the terms and conditions of Lloyd's excess policy and the primary bond."

Appellee, U. S. F. & G., contended, and we assume they will here contend, as the Court decided,—that the period for discovery of losses under the Lloyd's Bond was three years after its termination, by reason of the fact that the primary bond contained no Discovery Clause.

Is this a reasonable construction, or legally sound under the facts in this case?

We submit that it is not.

This is best answered by asking ourselves the question: What possible purpose could be served by the execution of such a rider, if in fact it could never be effectual? That is to say, if Lloyd's was already liable for any losses occurring during its currency, and which were discovered within three years thereafter, what would be the use of adding a rider to the U. S. F. & G. Bond for a period of one year (during said three-year period), which provided that U. S. F. & G. would be liable for such losses occurring during the term of Lloyd's Bond, only if they were not discovered within the time limited therein for the discovery thereof?

Let us revert, for the moment, to certain rules of contractual construction.

Where two or more constructions can be placed upon an instrument, and the acts of the parties, one of which

will result in rendering effectual the document or act, and the other of which will render such document or act useless and ineffectual, the Court will construe the instruments or acts in such way as to render them effectual and useful, and disregard the construction which will render them useless or ineffectual.

This of course is a familiar rule of construction, and has been stated in varying ways.

In C. C. 1643 it is stated as follows:

> "Interpretation in Favor of Contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Robbins v. Pacific Eastern Corp.*, 8 Cal. (2d) 241, 273 (65 Pac. (2d) 42), it is said:

> "The California courts have applied this rule of construction to a variety of situations. Supported by many authorities, the rule is stated as follows in 6 California Jurisprudence, page 268, section 168: 'As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing.' "

In *Rabbitt v. Union Indemnity Co.*, 140 Cal. App. 575, 585 (35 Pac. (2d) 42), the Court, in construing a contract of indemnity, said:

> "Several contracts relating to the same matters, between the same parties, and made parts of sub-

> stantially one transaction, are to be taken together, and the contract in question must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

Innumerable other decisions could be cited, setting forth this rule of construction in its various forms, but we believe the above will be sufficient.

Now, if the construction contended for by U. S. F. & G. is correct, then it must necessarily follow that that company, nearly three months after it had executed its original bond, added a rider which the obligee accepted, and the acts of issuing and accepting the same were performed for no purpose whatsoever and they therefore performed a completely idle act. Not only this, but in order to reach that conclusion the Court must say that U. S. F. & G. charged Fruit Growers a consideration for the purpose of attaching to an existent bond a useless piece of paper,—that is, one which under no circumstances could possibly be effectual or of value.

Such a construction leads to an absurdity, and is wholly inconsistent with the rules of construction heretofore mentioned.

On the other hand, if the construction contended for by Lloyd's be correct, then the document becomes valid, effectual and purposeful.

Thus we submit that it would be the duty of the Court to reject the construction which would render it worthless and meaningless, and adopt the one contended for by Lloyd's.

II.

All of the Parties to This Action Placed a Contemporaneous and Practical Construction Upon the Bonds in Question, Exactly as Contended for Herein.

If Doubt Exists, Then the Contemporaneous Construction of the Parties Furnishes a Guiding Light to Determine the Proper Construction to Be Placed Upon the Documents Involved.

Let us now refer to another rule of construction.

This rule has also been stated in varying language, but its principle is uniformly recognized by all the courts. In substance it is, that the contemporaneous construction of the parties, to a written instrument, is of great value, and is often controlling in the interpretation of written instruments.

In *Moore v. Superior Court,* 114 Cal. App. 333, 336 (299 Pac. 760), it is stated as follows:

> "The rule of law is well known that where a party to an agreement has placed a certain construction upon it his conduct in that regard will be most persuasive upon the courts to regard the instrument in a similar light."

In *Lemm v. Stillwater Land & Cattle Co.,* 217 Cal. 474, 481 (19 Pac. (2d) 785), the Court said:

> "In viewing the surrounding circumstances and the situation of the parties the court may also call to its aid the events subsequent to the execution of the contract, particularly the practical construction given to the contract by the parties themselves, as shedding light upon the question of their mutual intention at the time of contracting. (6 R. C. L., p. 853.)"

In *McCartney v. Campbell,* 216 Cal. 715, 719 (6 Pac. (2d) 729), the Court said:

> "It is well settled that the acts of the parties subsequent to the execution of a contract may be looked to in ascertaining its meaning, since they are in effect a *practical construction* thereof. (Citing cases.)"

Appellants submit that the above rule of construction applies very forcibly here.

The action of both Fruit Growers and U. S. F. & G., in having issued, attached to and made a part of U. S. F. & G.'s Excess Bond the Superseded Suretyship Rider above set out, must be construed as a construction on their part to the effect that since the Primary Bond contained no Discovery Clause, liability under the Lloyd's Excess Bond for losses not discovered prior to its expiry date, ceased simultaneously with the expiration of the bond, and in view of that fact, in order to provide continuous coverage, the Continuity or Superseded Suretyship Rider was executed. In other words, both U. S. F. & G. and Fruit Growers understood and construed the language of Lloyd's Bond exactly as Lloyd's understood it and intended it to be understood. We submit that the language of the bond is capable only of the construction and interpretation so placed upon it by all of the parties to this action, when carefully examined in the light of familiar principles of construction and interpretation.

If what we have said is not true, let U. S. F. & G. in its brief satisfactorily explain the purposes of such rider and its acts in connection therewith.

III.

The Language of the Contract Must Govern Its Interpretation. It Must Be Presumed That the Parties Were Familiar With the Rules of Grammar, and That They Used Apt and Well-Chosen Words to Express Themselves.

When Lloyd's Bond Is Examined and This Rule Applied, It Is Clear, Definite and Explicit, and Leaves No Room for Interpretation. To Imply Something Contrary to That Expressed, Is, in Effect, to Rewrite the Contract for the Parties. This Is Without the Legitimate Bounds of Judicial Propriety.

We are next brought to a consideration of the provisions of the above quoted clause in Lloyd's Bond.

First let us consider certain rules of construction which may be applicable.

C. C. 1638 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."

C. C. 1644 provides:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

C. C. 1645 provides:

> "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

C. C. P. 1858 provides:

> "In the construction of a Statute or instrument the office of a Judge is simply to ascertain and declare what is in terms or substance contained thereon,—not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

In *Loyalton, etc. v. California, etc., Co.,* 22 Cal. App. 75, at 77 (133 Pac. 323), the Court says:

> "Where parties have written engagements which industriously express the obligations which each is to assume, the Courts should be reluctant to enlarge them by implication as to important matters. The presumption is, that having expressed some, they have expressed all, of the conditions by which they intend to be bound. (Citing cases.)"

With these rules in mind, and the general rule so well established as to require the citation of no authority, to the effect that the parties are presumed to know and understand the rules of grammar and the use of language, and that they have expressed their will in apt and well-chosen terms (Black on Interpretation of Laws, 2nd Ed., p. 148), let us carefully examine the provisions of the clause in question.

The words "Policy", "Assured", "Discovery Clause", and "Primary Policy" are all capitalized. Why? Because they are proper nouns.

Foerster and Steadman's "Sentences and Thinking" says of capital letters:

> "The two fundamental uses of capitals are (1) to mark a new unit of thought, and (2) to designate a word as proper and not common."

> "Capitalize all proper nouns or adjectives. Names of persons or the equivalents of such names; names of races, languages, religious, political, social, legislative, educational, or military organizations; of wars, historical epochs or movements; of the days of the week, of the months, of holidays—are capitalized because they refer to specific, individual persons or things."
>
> "It is often difficult to determine whether a given noun is proper or common. But the context will, in most cases, enable one to determine whether the reference is to a particular person or thing, or to any one of a class of persons or things."

New Standard Dictionary, under "Capital Letter", says:

> "A letter larger and more conspicuous than others of the same font and of a different form, as the 'A' in 'Africa'; used to distinguish proper names, for the beginning of paragraphs or lines of poetry, and for titles and display."

Now, it will be noted that each capital letter used in the clause under examination, is properly and advisedly used.

"Policy" refers to a particuar policy.

"Assured" refers to the particular assured.

"Primary Policy" refers to the particular primary policy. Then what does "Discovery Clause" refer to?

Obviously it refers to a particular thing—that is, a Discovery Clause,—a thing which can be definitely and specifically identified and read, if it is in existence. It refers to a thing to be *expressed* in the Primary Policy,—not to something which may be *implied* or read into the Policy.

But upon examination we find no such express Discovery Clause contained therein.

What, then, is the result? To which question the answer must be, that this phrase was designed to cover the situation, *if* the Primary Policy contained a Discovery Clause. But if such Primary Policy did not contain a Discovery Clause, then the clause above mentioned would become inoperative, and we look elsewhere to determine the limitation of time within which losses must be discovered, which occurred during the currency of Lloyd's Policy.

This is simple, for the paragraph under scrutiny provides that the bond is "Warranted free for losses * * * not discovered during its currency".

Thus we submit that under the clear and explicit language of the clause under scrutiny, the time within which losses must be discovered in order to create a liability under Lloyd's Bond, was prior to the expiration of that bond.

To otherwise construe it, would be in contravention of the rules of construction so aptly expressed in C. C. P. 1858. It would be inserting something which has been omitted. It would be re-writing the contract of the parties.

This language is clear and explicit. There is no room for any interpretation. There is no room to declare, through construction, that because of the absence in the Primary Bond of any Discovery Clause, the time for discovery would be three years.

Nowhere in Lloyd's Policy is there any language which would justify such an interpretation. Nowhere have the

parties stated that if the Primary Policy contained no Discovery Clause, the time for discovery should be extended. Such a construction cannot be placed thereon, without doing violence to the very language of the contract, and holding that the execution of the U. S. F. & G. Superseded Suretyship Riders was a useless and meaningless act.

Now, it may be suggested that in view of the fact that Lloyd's was presumed to be familiar with the terms and conditions of the Primary Bond, the exception contained in the clause which we are examining must have been intended by them to have some effect. This is true, but the effect which it was to have, was to be conditioned upon the existence in the Primary Bond of a Discovery Clause. Clauses of this nature are standardized to cover every conceivable situation, and do not have to be prepared separately to fit every varying situation which might arise by virtue of the language in the Primary Bond. That this is true, can admit of no doubt, and certainly cannot be disclaimed by by U. S. F. & G., for both of U. S. F. & G.'s Excess Bonds contained similar clauses, as follows, to-wit:

> "(c) If the time limits specified in said primary fidelity suretyship for discovery of, or making claim for, loss after the expiration, termination or cancellation thereof as an entirety, or for filing notice of loss, for filing proof of loss or for bringing suit are less than the corresponding time limits in this bond, then this bond shall be subject to the time limits specified in said primary fidelity suretyship as if written herein. (d) If the time limit specified in said primary fidelity suretyship for the discovery of, or making claim for, or for filing proof of loss for, loss after the happen-

> ing of any of the events specified in Section A, paragraph 8, be greater or less than the corresponding time limit in this bond, then this bond shall be subject to the time limit specified in said primary fidelity suretyship as if written herein, provided, however, that in no event shall the time for discovery of, or making claim for, or for filing proof of loss for, any such loss be extended beyond the time within which, under the terms of this bond, losses must be discovered or claims must be made or proof of loss filed after the cancellation hereof as an entirety." [Tr. pp. 49-50, 96-97.]

Here is an instance where U. S. F. & G. has written both the Primary and the Excess Bond, and still their Excess Bond contains provisions referring to certain times *specified* in the Primary Bond, when they of course were bound to know that the Primary Bond had no period of time for discovery *specified* therein.

Thus they followed the same procedure Lloyd's followed, and used a standardized clause, which clause's effectiveness and operativeness depended upon the existence or non-existence of a specified time for discovery, either contained or not contained in the Primary Bond.

The situation is quite analogous to provisions in Constitutions which are not self-executing, but which require an enabling act to give them force and effect. Obviously, the exception does not *ex proprio vigore* enlarge the discovery period. That period would be enlarged only in case the Primary Bond provided a discovery period.

Provided how? By construction? No. By general terms of the Primary Bond? No. By limitation of three years? No. By statute of limitations? No. It would have to be

provided or "furnished" by an *express* Discovery Clause contained in the Primary Bond, and since none exists, then the provisions of the exception never became operative or effectual.

It may be argued by appellees that to require the Assured to discover his losses during the currency of the Lloyd's Bond, would work a hardship on the Assured, if the loss occurred near the period of its termination, and therefore that the Court should not construe the language of the bond in accordance with our contentions.

To this there are a number of answers.

In the first place, the parties in the instant case contracted at arm's length. There was no confidential or fiduciary relationship existing between them, and where parties freely so contract, in the absence of fraud, duress, mistake, etc., the courts will not concern themselves with the hardships or the benefits to be derived from the contract.

Secondly, it will be observed that the Lloyd's Bond does not cover only losses occurring during its term, for the one year from November, 1936, to November, 1937, but covers all losses *occurring* subsequent to November 1, 1935 [Tr. p. 36], or in other words, for the previous year also. Thus, a loss occurring between November 1, 1935, and November 1, 1936, but discovered between November 1, 1936, and November 1, 1937, would be covered by this bond.

The reason for this is obvious. Unlike the American companies, instead of writing Superseded Suretyship Riders, continuity of coverage is obtained by the renewal of the bond, thus carrying the period back to the first

writing of such bond, but when such bond is not renewed, the period of discovery ceases with its termination, unless the Primary Bond contains a Discovery Clause, in which event the period is extended in accordance with that provided or specified in such Primary Bond.

Now, let us carry our examination further, and see if the language of the pertinent clause will stand an interpretation other than contended for by Lloyd's.

Take the phrase, "a period equal to that provided by the Discovery Clause".

"Provided", is defined in Webster's as "furnished", and it is so defined in *King v. State,* 30 Tex. Civ. App. 320 (70 S. W. 1019, 1021).

In *People v. Joyce,* 246 Ill. 124, 92 N. E. 607, it is defined as "to fix; to establish as a previous condition; to determine; to settle".

"Equal" is defined by Webster's, and in a number of decisions, as being in just proportion.

In *Fechteler v. Palm,* 133 Fed. 462, 471, it is defined as "measured or estimated by".

From this it is obvious that the exception contained in the clause under scrutiny, could have no application here, for the reason that no discovery period was *provided* or *furnished* by the Primary Bond.

Lloyd's Bond is referring to an expressed period—not to one *not* expressed therein, or to be implied. How could the period be *equal* to a period which does not exist? But suppose the Court should attempt to rewrite the contract, through the expedient of interpretation or construction, so as to make a period which would be *equal,*—or in other

words, did, by such construction, insert in the contract something which did not appear therein. What would it insert? One year? Eighteen months? Six months? Or what? The discovery in the instant case was two years and eight months after the expiration of the bond. If the Court, by interpretation or construction, were to fix a period less than two years, then still there would be no liability under the bond, since the discovery would not have been made within that time.

This, we submit, demonstrates the fallacy of attempting, through construction, to rewrite the contract. The clause does *not* say that the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond, *and if the Primary Bond has no Discovery Clause, then a period not exceeding three years,* but if the Court should so interpret it, it would be the same as though the Court had inserted the above italicized portion, which would be contrary to the fundamental and basic rules of construction and interpretation.

Finally, in order to avoid confusion or misapprehension, we desire to mention one additional matter.

Since the Primary Bond contained no Discovery Clause the impression might arise that the period for discovery was the same as the Statute of Limitations, to-wit, four years, or that reference to the Discovery Clause was in effect a reference to the Statute of Limitations.

Such of course is not the case. The Statute of Limitations is separate and distinct from provisions relative to Discovery Clauses. The fact that a Discovery Clause may limit the Assured's right to recover under the bond, has nothing to do with his right to bring an action there-

under. If the discovery has been made within the time provided by the bond, then unless limited by contract, the right to bring an action is governed by the Statute of Limitations, and vice versa, if there has been a failure to discover within the time prescribed by a Discovery Clause, then the fact that the Assured may have ample time within the provisions of the Statute of Limitations, within which to file his suit, does not in itself create a liability under the bond. This, we think, is obvious, but out of an abundance of precaution we cite to your Honorable Court a decision wherein the very question has been raised and decided.

In *Ballard v. U. S. Fidelity and Guaranty Co.,* 150 Ky. 236 (150 S. W. 1), the Court had this matter squarely presented to it, and there said:

> "The bond does not attempt to fix the period in which suit shall be brought. It simply provides for liability for losses occurring and discovered within a certain specified time. If the losses are of the character contemplated by the bond, and occur and are discovered within the time fixed by the bond, then the obligee in the bond may bring his action whenever he pleases, within the limits fixed by the sections, *supra.* It follows, therefore, that the bond in no sense fixes a period of limitation different from that prescribed by the Statute."

To the same effect see:

City Bank v. Bankers' Limited Mut. Casualty Co., 238 N. W. 819;

Webster v. U. S. Fidelity and Guaranty Co., 169 Miss. 472 (153 So. 159).

IV.

Every Contract Should Be Interpreted So as to Give Effect to Every Word, Phrase, Sentence and Clause.

To Interpret Lloyd's Policy as Extending the Time for the Recovery of Losses Beyond Its Expiry Date, Even Though It Was Not Renewed, Would Render Ineffectual and Meaningless a Portion of the Clause Under Scrutiny.

Some bonds contain no Discovery Clause. Some require discovery during the currency of the bond. Others have periods of three months, six months, one year, etc.

Innumerable cases involving Discovery Clauses have been the subject of decisions by the courts, and such clauses have been uniformly upheld. The following are a few examples:

City Bank v. Bankers' Limited Mut. Cas. Co. (1931), 238 N. W. 819;

Thompson v. American Surety Co. (1930), C. C. A. 8th, 42 Fed. (2d) 953;

Ballard v. U. S. Fidelity and Guaranty Co., 150 Ky. 236, 150 S. W. 1;

Chicora Bank v. U. S. Fidelity and Guaranty Co. (1931), 161 S. C. 33, 159 S. E. 454;

Miners & Merchants Bank v. U. S. F. & G. Co., 233 Fed. 654;

Florida Cent. & P. R. R. Co. v. American Surety Co., 99 Fed. 674.

In the development of the history of surety bonds, the earlier bonds contained no Discovery Clause, while in

later years Discovery Clauses began to appear more frequently, and while they appear in most instances in bonds written as of the present time, the rule is not universal.

As has been indicated, Lloyd's and other large insurance carriers endeavor, through a uniform clause, to protect themselves in relation to Discovery Clauses contained in Primary Bonds, so that their standard clause will be applicable in each instance, whether there is or is not a Discovery Clause contained in the Primary Bond, thus eliminating the necessity of writing a new and separate clause in each instance. Thus the clause contained in Lloyd's Bond in the instant case was designed to be applicable under all circumstances, so that if no Discovery Clause was contained in the Primary Bond, then the right of discovery would cease upon the expiration of the time the bond itself ceased to be effective, and if the Primary Bond did contain a Discovery Clause, then the right of discovery would be co-extensive with it; provided, however, such period of discovery should not exceed three years.

From the foregoing decisions we have already seen that every part of a clause should be given effect, if it can be done without doing violence to the intention of the parties.

This fundamental rule is well stated in 23 *Cal. Jur.* 758, Sec. 133, and supporting cases, as follows:

> "Every Part to Be Given Effect. It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect, not only to the statute or code section as a whole, but to each and every part thereof,—*i. e.,* to every word and clause, and certainly to every distinct or co-ordinate

> provision or section. Such meaning must be given, if possible, as will permit the whole statute to stand, and leave no part useless, or deprived of all sense and meaning, even to sustain the validity of the act. Words should never be considered unnecessary and surplusage, if a reasonable construction can be adopted which will give force to and preserve all the terms of the statute. Any construction should be avoided which implies that the legislature was ignorant of the meaning of the language as employed, or that it used words in vain, the legal intendment being that each and every word or clause was inserted for some useful and sensible purpose, and that, when rightly understood, it may have some practical operation. If certain provisions are repugnant, effect should be given to those which best comport with the end to be accomplished and render the Statute effective, rather than nugatory."

With this rule in mind, let us now further examine Lloyd's Excess Bond.

We shall hereafter refer to the following portion thereof, to-wit:

> "Warranted free of all claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency,"

as the "main clause", and the remaining portion of the clause, to-wit:

> "with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance."

shall hereafter be referred to as the "exception to the main clause".

Referring to the main clause separately, it will be observed that it is all-inclusive; that is, that there could be no claim under this policy, where the loss was not discovered during the time the policy was in effect. This means—

(1) If the policy was renewed;

(2) If the policy was not renewed.

The exception, which starts with the phrase "with the understanding", is the same as though it said "except", or "provided, however", or used similar terms.

In accordance with common sense and the rules of construction above mentioned, it is necessary for us to give full force and effect, if it reasonably can be done, to each phrase, sentence, word, etc., of this paragraph. Can this be done under the construction contended for by U. S. F. & G.? If not, then their position must be unsound, and the one contended for by appellants should be adopted.

Obviously, if the Policy were renewed, then Subdivision (1) of the Main Clause would become operative, and the balance of the Main Clause and the Exception to the Main Clause would be inoperative, since the Clause is drawn in the alternative, but as we have seen, the Policy was not renewed in the instant case, and it next becomes incumbent upon us to examine Subdivision (2) of the Main Clause and the Exception to the Main Clause, and in so examining and construing them we must bear in mind that they should be construed so as to give effect to both Subdvision (2) of the Main Clause and the Exception thereto.

Now, the Exception to the Main Clause stated that in the event of non-renewal the Assured should have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond.

Had the parties intended that the Main Clause should apply only when there was a renewal of the bond, they undoubtedly would have said so.

The Exception to the Main Clause is, in itself, complete, and had the Primary Bond contained a Discovery Clause this Exception would be effectual and operative. Thus a purpose is supplied for that phrase, and therefore if the bond did contain a Discovery Clause it would leave ineffectual Subdivision (2) of the Main Clause.

Now, if we say that since there was no Discovery Clause, the bond being not renewed, there still remains a right to discover up to a limit of three years,—what possible effect can be given to Subdivision (2)? What purpose can be attributed to the parties to the contract, in using language of this nature? If the lower court's decision is correct, no possible purpose can be attributed to it. It is useless, ineffectual, and surplusage.

On the other hand, if we follow the rules of construction above set out, which rules, we submit, are consonant with sound reason and logic, we will give effect to the language of the Main Clause and particularly to Subdivision (2) of the Main Clause, for under such circumstances, there being no Discovery Clause contained within the Primary Bond, the limitation for the discovery of losses becomes fixed and determined by Subdivision (2) of that Clause.

We respectfully submit that the language of this Clause should be understood as it is written, and in effect should be interpreted as though it read, in effect:

> "Warranted Free of all Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, *whether this bond be renewed or not,* with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond, *if the Primary Bond contains a Discovery Clause,* (but not exceeding three years), in which to discover losses claimable under this Insurance."

Diligent search for cases exactly in point, has failed to disclose any. There are, of course, decisions where losses occurred during the currency of a particular bond, and were not discovered within the period provided for therein, where the subsequent surety has been held liable for the losses under their superseded suretyship riders. Such a case is that of *American Employers' Ins. Co. v. Roundup Coal Mining Co.,* 73 Fed. (2d) 592.

We have been fortunate in finding an early California case which we believe analogous to the situation involved herein, and although that case did not involve a surety bond, the principle announced therein is, we believe, identical with the one here under consideration. Since the National Reporter system does not cover this case, we give only the California citation. It is *Caldwell v. Center,* 30 Cal. 539.

That was an action for ejectment, and one of the links in the chain of title under which plaintiff claimed, was a deed from Stevens and Abell to Lyons and Sturtevant, of a parcel of land "known as Lot Number One in the

subdivision of the tract of land lying on the new county road and known as Foley's Tract, the map of which is duly recorded in the Recorder's Office of the County of San Francisco, reference to which is herein made."

After holding that the parties to a deed might describe the property by reference to another instrument which would completely describe it, the Court said:

> "The deed and the instrument therein referred to, when taken together, must be as certain in respect to the description of the premises, as a deed containing no direct reference to another document.
>
> * * * * * * * *
>
> The deed of Stevens and Abell to Lyons and Sturtevant is not sufficient in the description of the premises conveyed, to designate and attach itself to any particular tract of land without the aid of further evidence. Admitting that the exterior lines of the Foley Tract were as claimed by the plaintiff, evidence of some kind was requisite to show where Lot Number One was located. The only evidence introduced by the plaintiff for this purpose was a map from the Recorder's Office and a map from the Surveyor's Office, and parol testimony in explanation of the last map. The defendants objected to the map from the Recorder's Office on the grounds, among others, that 'it was made with pencil and not with ink', and that 'it is pasted in between the leaves of the book, but not recorded'.
>
> The objection should have been sustained. Had the deed referred to a map to be found in that place and condition, it would have been admissible in evidence, for it would have constituted in effect a part of the deed, as much as if it had been copied into it. (Vance v. Fore, 24 Cal. 444, and cases cited.) But the deed calls for a map duly *recorded* in the Re-

> corder's office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. * * * The map should for these reasons have been excluded. The map from the Surveyor's office did not fill the place of the one specified in the deed. * * * as the map now appears before us, it does not fill the place that the parties to the deed designed should be occupied by the map they designated as containing the metes and bounds of the tract of land conveyed. By excluding the map from the Recorder's office, which should have been done, the plaintiff's chain of title is broken."

We consider the foregoing case analogous, for the reason that therein it is obvious they designated a map as being recorded in a particular place, and the Court italicized the word "recorded". Now it appears that in that case there was a map present, but the map was not as designated in the original instrument.

In the instant case there is a reference to a Discovery Clause, and the time provided by that Discovery Clause, in the Primary Bond,—yet upon examination we find that there was no Discovery Clause contained in the Primary Bond, and as a consequence the situation is analogous to the deed in the above case, which referred to something which did not exist.

The instant case, however, is much stronger than the foregoing, for the obvious reason that there the Court had before it a document which appeared to be one to which the parties were referring, and the clause was not drawn in such a manner as to be in the alternative, so that if no Recorded Map existed, then another phrase of the clause under inspection would become operative, as we have shown was the fact in the instant case.

V.

The Real Controversy Here, Is Between Two Sureties,—Not Between a Surety and an Insured. Therefore Rules of Construction Often Applied in Favor of an Insured and Against an Insurer, Do Not Apply, but Should the Court Disagree With Us, Then the Rules Should Be Applied Not Only Against Lloyd's, but With Equal Force Against U. S. F. & G.

Finally, we take the liberty of anticipating the possible contention by U. S. F. & G., that being a fidelity bond, and Lloyd's Bond having been drawn by itself, and a premium charged therefor, the Court should construe all of its provisions most strongly against it, and in favor of the plaintiff, Fruit Growers.

The rules for construction of bonds, as is so well known, has been stated in varying ways, some cases indicating that there should be a strict construction placed upon such bonds, and that the Court should not enlarge the contract by construction. Others state that there should be a liberal construction against sureties who have written bonds for a consideration, and others state that bonds are contracts, like other contracts, and that the rules of construction apply the same in such cases, as they do in the cases of other contracts.

We feel that it is wholly immaterial what one of these rules of construction the Court desires to follow, for the very simple and obvious reason that the Court is not here concerned with the construction only of Lloyd's Bond, but it is here concerned with the construction of a number of documents as a whole, which of course includes the

bonds written by U. S. F. & G. Therefore, if the rule of liberal construction is to be applied as against Lloyd's, it must also be applied against U. S. F. & G. The weight must fall equally upon both of these sureties. It would not comport with the most fundamental principles of justice, to single out Lloyd's Bond and attempt to apply the rule against it, and either disregard U. S. F. & G.'s Bond or apply a different rule in relation to that surety.

Certainly, as we have shown, the application of a rule of liberal construction to both of them would weigh far more strongly against U. S. F. & G., by reason of the execution by them of their Superseded Suretyship Riders, than it would against Lloyd's, but aside from all this, we submit that the rule of construction which requires an interpretation most strongly against the one who used the language, has no application whatsoever in the instant case. No rule ordinarily favorable to an assured under a policy, can justly apply herein, since the real controversy is not between the assured and the insurer, either as to U. S. F. & G. or Lloyd's. The real—the basic—the fundamental, and the obvious controversy, is between two sureties,—that is, between Lloyd's and U. S. F. & G., and neither reason nor decision would support the application of the rules which apply only when there is a real controversy between the assured and the insurer.

This rule, which we believe will appear obvious, has been announced in the case of *"The Grecian"*, 78 Fed. (2d) 657, 662, wherein the Court said:

> "Neither does the rule of strict construction against one who chose the language used, aid the appellant, although it seeks to invoke it on the theory that the

carriage contract was ambiguous in respect to assumption of liability for sea perils. It was not a party to the contract, so without the scope of the rule. National Fire Ins. Co. v. Maddox, 224 Mo. App. 90, 20 S. W. (2d) 705, 707."

Conclusion.

In conclusion we respectfully submit:

(1) That there is presented here a pure and unadulterated question of law;

(2) That any other construction than contended for herein, would lead to the absurd result of attributing to U. S. F. & G. the performance of a useless and meaningless act, in the execution of the Superseded Suretyship Rider, and the acceptance by them of a consideration for a worthless piece of paper;

(3) That the contemporaneous construction placed upon Lloyd's Bond by Fruit Growers and U. S. F. & G., was exactly the same as that placed thereon by Lloyd's, and as contended for herein;

(4) That Lloyd's Bond is clear, definite and unambiguous, and that there is therefore no room for construction;

(5) That to hold that Lloyd's was liable for losses discovered within three years after its bond expired, would require the Court not to construe the contract, but to rewrite and insert that which had been omitted.

Respectfully submitted,

CHAS. E. R. FULCHER,

Attorney for Appellants.

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE CALIFORNIA FRUIT GROWERS EXCHANGE.

GEORGE E. FARRAND,
ROSS C. FISHER,
FARRAND & FARRAND,
1028 Pacific Southwest Building,
Los Angeles, California,
Attorneys for Appellee California Fruit Growers Exchange.

Parker & Baird Company, Law Printers, Los Angeles

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE CALIFORNIA FRUIT GROWERS EXCHANGE.

This appellee adopts the designations used by appellants to designate the parties to this action, namely: Appellants are referred to as "Lloyd's", this appellee as "Fruit Growers", and appellee United States Fidelity and Guaranty Company as "USF&G".

This is an appeal from a judgment, dated and entered August 31, 1942, of the District Court of the United States for the Southern District of California, rendered by the Honorable Harry A. Hollzer in favor of Fruit

Growers in the sum of $22,019.22 and its costs, taxed in the sum of $22.14 and reporter's fees in the sum of $12.40 [Tr. pp. 205-207].

The judgment, approved as to form by the attorneys for both Lloyd's and USF&G, provides as follows:

> "It Is Therefore Ordered, Adjudged and Decreed that plaintiff have judgment against defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, for the sum of $22,019.22, and for plaintiff's costs incurred herein, hereby taxed in the sum of $22.14, and for reporter's fees in the sum of $12.40; together with interest on said judgment from the date of this judgment at the rate of seven per cent per annum;
>
> "It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing by reason of this action against defendant United States Fidelity and Guaranty Company, a corporation; provided, however, that in the event defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, shall appeal from this judgment and if it shall be finally determined that plaintiff is not entitled to recover from defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, then plaintiff shall have and recover from defendant United States Fidelity and Guaranty Company, a corporation, the sum of

> $22,019.22, together with interest thereon from the date of this judgment at the rate of seven per cent per annum, and together with plaintiff's costs herein incurred."

All the facts in the case were stipulated to [Tr. pp. 128-133, 134-138, 186-193]. It was stipulated by both Lloyd's and USF&G with Fruit Growers that Fruit Growers was entitled to recover either against Lloyd's or against USF&G. Lloyd's stipulated that in the event the court should hold USF&G not to be liable under its policies of excess insurance, or either of them, Lloyd's would be liable to Fruit Growers, and that judgment might be entered in its favor against Lloyd's in the sum of $22,019.22. Similarly USF&G stipulated that in the event the court should hold Lloyd's not to be liable under its policy of excess insurance, USF&G would be liable to Fruit Growers, and that judgment might be entered in favor of Fruit Growers and against USF&G in the said sum of $22,-019.22 [Tr. pp. 190-191, paragraph number 7].

Thus there is no controversy over the right of Fruit Growers to recover the sum of $22,019.22 and its costs against either USF&G or Lloyd's. The controversy rather is whether USF&G is liable to Fruit Growers or whether the liability falls on Lloyd's. This was conceded by both Lloyd's and USF&G by the stipulations above referred to. It was conceded by both Lloyd's and USF&G by the approval as to form of the judgment by the attorneys for both bonding companies. It was further conceded by Lloyd's in its opening brief herein (Appellants' Opening Brief, p. 7).

Fruit Growers, therefore, takes no part in the dispute between Lloyd's and USF&G as to which is liable since

under the judgment of the District Court in the event it should be finally determined that Lloyd's is not liable it is provided that Fruit Growers then have and recover against USF&G. In the event this court should determine that the liability rests upon USF&G rather than upon Lloyd's, Fruit Growers asks that this court direct the Clerk of the District Court to enter judgment in favor of Fruit Growers against USF&G in the sum of $22,-019.22, together with interest thereon from August 31, 1942 at the rate of seven per cent per annum, together with Fruit Growers' costs of suit.

Respectfully submitted,

GEORGE E. FARRAND,
ROSS C. FISHER,

FARRAND & FARRAND,
Attorneys for Appellee California Fruit Growers Exchange.

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

ANSWERING BRIEF OF APPELLEE UNITED STATES FIDELITY AND GUARANTY COMPANY.

MILLS & WOOD,
811 C. C. Chapman Building, Los Angeles,
Attorney for Appellee, United States Fidelity and Guaranty Company.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

STATUTES.

TEXTBOOKS.

No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

ANSWERING BRIEF OF APPELLEE UNITED STATES FIDELITY AND GUARANTY COMPANY.

United States Fidelity and Guaranty Company respectfully submits its brief in answer to that of appellants.

Statement of Pleadings, Facts and Statutory Provisions.

The statement under this caption, by appellants, is in substance, correct, and at the outset need not be enlarged upon.

Statement of the Facts and of the Case.

Every fact not admitted by the pleadings, appears in the stipulations of the parties appearing in the record.

From these sources it appears that as of October 23, 1912, appellee United States Fidelity and Guaranty Company (sometimes for brevity referred to as "U.S.F. & G.") issued to plaintiff and appellee, California Fruit Growers Exchange (sometimes called "Fruit Growers") its schedule fidelity bond, referred to as ("Primary Bond"). This bond has remained in force continuously since that time, and is set forth in the transcript at pages 13 to 25, inclusive.

By that Primary Bond, appellee, U.S.F. & G., guaranteed to pay Fruit Growers, referred to therein as "The Employer", such pecuniary loss as the Employer shall sustain by acts of fraud, dishonesty, etc. by any of the employees of the Fruit Growers, listed under the bond, with a maximum of liability of $1,000.00 as to Floyd E. Jones, a listed employee of Fruit Growers, and that maximum of liability under that bond, continued throughout and including the times when the defalcations of Jones involved in this action, as shown by the stipulations hereinafter referred to, took place.

From the time of the execution of the Primary Bond until November 1, 1935, Fruit Growers carried no excess insurance as to any employee, so far as this record discloses.

On November 1, 1936, the appellants, Underwriting Members of Lloyd's (referred to as "Lloyd's"), executed and delivered to Fruit Growers their "Certificate of Insurance", shown at pages 26 to 33, inclusive, of the transcript, whereby Lloyd's insured Fruit Growers, "during

the period commencing with the 1st of November, 1936, and ending with the 1st of November, 1937, both days at noon, on Excess Blanket Fidelity in the amount of $25,000.00 over and above Primary Limit . . . on United States Fidelity and Guaranty Bond . . ." [Tr. p. 26.]

This Certificate of Insurance provides that it is to be used "as evidence that insurance described above has been effected, against which underwriter's certificate or policy will be duly issued by the Underwriters" [Tr. p. 27], and that "This Policy is to indemnify the Assured against all direct loss as the Assured may sustain by reason of the dishonesty of any employees in their employment who are bonded under a Bond or Bonds (hereinafter called Primary Bonds) issued by an approved Insurance Company, subject to the conditions hereinafter contained." [Tr. p. 28.]

By paragraph 4 of the Certificate and the policy it is provided:

> "4. It is further understood and agreed that this excess insurance is subject to all the terms and conditions of the said Primary Bonds insofar as the same do not conflict with the terms and conditions herein contained. . . ." [Tr. p. 29.]

And by paragraph 5 thereof, it is provided:

> "5. Warranted Free of all Claim for losses occurring subsequent to the expiry date of this Policy and for losses discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance." [Tr. p. 29.]

As of November 1, 1936, the formal bond of Lloyd's was issued covering the same period, the same amount, and with identical conditions and provisions as the Certificate theretofore issued, it being noted that both the Certificate and Policy afford coverage to Fruit Growers for "such portion of the ultimate net loss sustained by the Assured in respect of defalcations committed by any such employee subsequent to the 1st day of November, 1935, as shall be in excess of the amount for which such employee is bonded under said Primary Bonds, provided always that Underwriter's liability shall in no event exceed the sum of $25,000.00 in the aggregate." [Tr. pp. 28 and 36.]

The policy of Lloyd's expired on November 1, 1937, and was not renewed.

As of November 1, 1937, U.S.F. & G. issued to Fruit Growers its "Excess Commercial Blanket Bond" [Tr. pp. 55-61], by which it agreed to indemnify Fruit Growers "to an amount not exceeding in the aggregate, for all losses under this bond" in the sum of $25,000.00, "in excess of the amount or amounts carried under the primary fidelity suretyship" described therein [Tr. p. 55], which is its primary bond issued to Fruit Growers, on October 23, 1912 [Tr. p. 47], the excess losses being those committed by an employee, "during the term of this (excess) bond" and while this (excess) bond and said primary fidelity suretyship are in force." [Tr. pp. 45-46.] The term of the excess bond is prescribed as beginning with the 1st day of November, 1937, and ending at 12 o'clock night

on the effective date of the cancellation of the excess bond. [Tr. p. 46.]

On January 12, 1938, U.S.F. & G. attached to its excess bond a rider, wherein the policy of Lloyd's is referred to as the "prior bond" and which rider, so far as material to this action, reads as follows:

"UNITED STATES FIDELITY AND GUARANTY COMPANY
Baltimore, Maryland
Rider

No. 02-308-37 $.....

To be attached to and form a part of Excess Commercial Blanket Bond, (Standard Form AA) No. 14815-02-308-37, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-five Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, *et al.* (hereinafter called Employer), and dated the 1st day of November, 1937.

Whereas, Lloyd's issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective the First day of November, 1936, in the amount of Twenty-five Thousand Dollars ($25,000.00), and in favor of the Employer; and

Whereas, the prior bond, as of the effective date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under the attached bond and the attached bond as extended by this rider, or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller." [Tr. pp. 62-63.]

The effect of this rider was to "pick up" or cover losses sustained during the currency of Lloyd's policy, but which were not discovered until *after* the expiration of the time limited in Lloyd's policy for discovery of losses sustained during the currency of Lloyd's policy, and expressly excluded coverage for losses sustained while Lloyd's policy was in force and discovered within the time specified therein for the discovery of losses thereunder.

And on November 1, 1938, U.S.F. & G. executed and delivered to Fruit Growers its "Excess Commercial Blanket Bond," by which it agreed to indemnify Fruit Growers in a similar amount as provided in its bond of November 1, 1937. This bond covers for losses sustained during its currency, and during the currency of the primary bond, and contains provisions similar to those contained in the prior 1937 bond. It has attached to and made a part of it, a rider similar in all respects to the rider attached to the 1937 bond, with this exception:

The rider attached to the 1937 bond refers to the Lloyd's policy as the "prior bond" [Tr. p. 62], while the 1938 bond refers to the U.S.F. & G. 1937 bond as the "prior bond". [Tr. p. 112.]

On March 19, 1942, a stipulation between Fruit Growers and U.S.F. & G. was entered into and was filed on March 20, 1942. [Tr. pp. 128-133.] On January 6, 1942, a like stipulation between Lloyd's and Fruit Growers was entered into and was filed March 20, 1942. [Tr. pp. 134-138.] Both these stipulations provide that from a date prior to May 1, 1937, to November 1, 1939,

one Floyd E. Jones was employed by Fruit Growers and was scheduled as an employee under the Primary Bond of U.S.F. & G.; that his defalcations during the period from May 1, 1937, to November 1, 1937, aggregate the sum of $23,019.22; that U.S.F. & G. paid the amount covered by its Primary Bond, and that these losses were of a nature as would be covered by the Primary Bond, by Lloyd's excess policy, and by the 1937 and 1938 bonds of U.S.F. & G. [Tr. pp. 130-131; p. 136.]

By a supplemental stipulation [Tr. pp. 186-193], it was agreed that the plaintiff, Fruit Growers, is entitled to recover the net excess loss of $22,019.22, after deducting the amount paid by U.S.F. & G. on its Primary Bond, against either Lloyd's or U.S.F. & G., Lloyd's agreeing that in the event the court should hold U.S.F. & G. not to be liable, judgment should be entered against Lloyd's for $22,019.22, and similarly, U.S.F. & G. agreed that in the event the court should find Lloyd's not to be liable, judgment should be entered against U.S.F. & G. for $22,019.22. [Tr. pp. 190-191.]

It was further provided in this stipulation that on July 31, 1940, plaintiff, Fruit Growers, discovered for the first time that said Floyd E. Jones might not have accounted for all moneys received by him on plaintiff's behalf [Tr. pp. 189-190]; further, that it is to be legally inferred that at the time Lloyd's issued its excess policy, Lloyd's was familiar with the terms and conditions of the Primary Bond of U.S.F. & G., and likewise, that it is to be

legally inferred that U.S.F. & G., at the time it issued its 1937 and 1938 bonds and riders thereto, it was familiar with the terms and conditions of Lloyd's excess policy and the Primary Bond. [Tr. p. 191.] It was further stipulated that no evidence need be introduced and that findings of fact and conclusions of law were waived.

Lloyd's contended that U.S.F. & G. was liable by reason of the riders attached to its bonds, and that Lloyd's liability ceased upon the termination of its excess policy, for all losses not discovered prior to that time.

U.S.F. & G. contended that Lloyd's was liable for all losses occurring during the currency of its policy, and discovered prior to the expiration of three years from the expiration and non-renewal of its excess policy on November 1, 1937, by reason of Condition 5 of its policy heretofore set out.

Upon the submission to the trial court of the case upon the stipulations, Honorable Harry A. Hollzer, judge presiding, on July 14, 1942, filed his opinion and memorandum of conclusions, finding that Lloyd's was liable [Tr. pp. 194-203], and judgment was entered accordingly. [Tr. pp. 205-207.]

As appellee, United States Fidelity and Guaranty Company, will conclusively show, none of the specifications of error assigned by appellant Lloyd's, are well taken, and for the sake of brevity, this appellee adopts the statement of events numbered 1 to 9, inclusive, as shown at page 13 and continuing on page 14 of the appellant's brief.

ARGUMENT.

I.

A Fidelity Bond Is Given a More Liberal Construction Than a Contract Involving the Rights of a Surety, and Fidelity Bonds Are Essentially Insurance Contracts. And to Hold That Appellants Are Not Liable Would Render the Controlling Provision of Lloyd's Policy Wholly Meaningless.

The controversy here involved and the correctness of the judgment of the trial court, depend essentially and primarily upon the correct interpretation of that clause or provision of Lloyd's policy which reads as follows:

> "5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in the event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance." [Tr. p. 38.]

Appellee adopts the language of Judge Hollzer, in his opinion, as the true and correct rule of interpretation to be applied to this quoted provision, as follows:

> "The court concludes that in conformity with the fundamental rules of construction, every clause, every phrase, and every distinct provision in the policies sued upon herein should be given meaning and effect; that such meaning must be given, if possible, as will permit the particular policy involved to stand and leave no part useless, or deprived of all sense and meaning; that words should never be considered unnecessary and surplusage, if a reasonable construc-

> tion can be adopted which will give force to and preserve all of the terms of such policy; that any construction should be avoided which implies that the party drawing the policy was ignorant of the meaning of the language employed, or that he used words in vain, the legal intendment being that each and every word or clause was inserted for some useful and sensible purpose, and that when rightly understood it may have some practical operation." [Tr. p 202.]

At page 32, and following, of appellants' brief, it is contended, as it was contended in the trial court, that the quoted provision or condition of Lloyd's policy should be broken up into separate and distinct clauses and so construed as to render all except the so-called "main clause" utterly devoid of any meaning or purpose whatever, and it is respectfully submitted that appellants, at page 35 of their brief, concede that to adopt the interpretation contended for, it is necessary to insert or read into the provision words that are not there, the added words being italicized by appellants.

In other words, if at the time Lloyd's policy was written, it had been the intention of the authors thereof, to have the policy mean what is now contended for, it would have been easy to accomplish that purpose by making the provision read as appellants designate the "main clause", as follows:

> "Warranted Free of all Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency."

To have stopped there, would have left no question that the losses here involved would not have been covered, but

with the added language, as actually contained in the policy, it is equally clear that the provision means, and was intended to mean, that there was a period beyond the expiry date of Lloyd's policy, within which losses sustained or occurring during its currency might be discovered and be "claimable" under the policy. That period, by all reasonable construction, is three years from November 1, 1937. The losses here involved were discovered on July 31, 1940, within such three-year period.

The untenable claim of Lloyd's in this case, is made manifest by the simple suppositious case of a faithless employee, against whose dishonesty the Fruit Growers desired and paid for protection, should steal or misappropriate the moneys of the employer on the 31st day of October, 1937, and so cover up his defalcation that it was not discovered until November 2, 1937, and that Fruit Growers would then be informed that it did not have the protection it thought it had and for which it had paid.

In support of the judgment of the trial court in this case, appellee, United States Fidelity & Guaranty Company, cites the following:

Authorities.

(Unless otherwise stated, emphasis in quotations from authorities, are ours.)

> "Furthermore, it is a fidelity bond, and will be given a more liberal construction than a contract which involves only the pure question of the rights and obligations of a surety."
>
> *First State Bank v. Metropolitan Cas. Ins. Co.*, 79 S. W. (2d) 835 (citing Couch's Cyclopedia of Insurance Law, Vol. 5, Sec. 1199a, p. 4324, and authorities there cited).

"Bonds or contracts of those companies which guarantee the fidelity of employees and which make the business one for profit, are essentially insurance contracts * * *. Therefore the rights and liabilities of the parties are governed in case of ambiguity by the rules of construction applicable to insurance, rather than by the rule *strictissimi juris* which determines the rights of ordinary guarantors or sureties without pecuniary consideration. (Citing numerous authorities.)"

Joyce on Insurance (1918), Vol. 4, p. 4608, Sec. 2766.

"Another point to be considered in connection with risks and losses, is that fidelity guaranty insurance is a contract of indemnity; and inasmuch as obtaining full indemnity is the general purpose, it should not be defeated except by limitations which are expressly and clearly set forth without ambiguity in the contract. (Citing cases.)"

Joyce on Insurance (1918), Vol. 4, p. 4609, Sec. 2766 (119).

"The rule is well established that a contract of fidelity or insurance susceptible of two constructions, one favorable to the insured and the other to the insurer, should be construed favorable to the former."

Hartford Acc. & Ins. Co. v. Swedish Methodist Assn., 92 Fed. (2d) 649, at 652.

Citing:

First National Bank v. Hartford, etc., 95 U. S. 673, 678, 24 L. Ed. 563;

Thompson v. Phoenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408;

American Surety Co. v. Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. Ed. 977.

See, also:

State Bank of Prague v. American Surety Co., 288 N. W. 7 (Minn.).

"It being entirely clear that within the contemplation of the parties, their stipulations were for the purpose of affording indemnity to the obligee, all substantial doubts with respect to the meaning of the terms they employ should be resolved to effectuate that obvious intention."

Joyce on Insurance (1918), Vol. 4, p. 4664, Sec. 2766.

See, also:

Century Digest, 4th Decennial Edition, "Insurance," Sec. 146(3), citing cases from all state and federal jurisdictions.

Court will not follow a refined construction of the language used by a surety in a fidelity bond, to defeat the promised and paid for protection under the bond.

Franklin Savings & T. Co. v. American Employers Ins. Co., 99 Fed. 494 (120).

In *Webster v. United States Fidelity and Guaranty Company,* 153 So. 159 (Miss.), the foregoing statements are supported. In that case it is said:

"When all the provisions of this rider are considered together, it appears that the only purpose of the claim last referred to is to continue the prior bond for the purpose of permitting a recovery *under the last bond for any losses recoverable under the prior bond.*"

"The last bond, which was executed May 14, 1928, contains no provisions requiring losses thereunder to be discovered within any fixed time to create liability therefore, and therefore the appellant is *entitled to recover under the terms and conditions thereof for losses occurring during the term thereof.*"

"We do not think the provision hereunder reviewed attempts to change or limit the statutory period for bringing suits, but it is rather one providing *what class of losses are covered and limiting liability* thereunder to those losses discovered within that period."

In *State Bank of Prague v. American Surety Co.,* 288 N. W. 7 (Minn.), the bond was in effect for one year. It provided for notice within a specified period after discovery and the filing of claim within three months after discovery.

It was contended that the defalcation was not within the coverage, because, while it resulted from acts done within the coverage period, there was no liability because not discovered until afterward.

At page 12 of the opinion, the Court says:

"The policy does not expressly provide that it only shall cover losses discovered during the coverage period. Where, as here, the insurance is to indemnify the insured against loss through the fraudulent and dishonest acts of his employee in connection with the duties of his employment, *the insurance covers all losses due to such acts committed during the coverage term,* whether *discovered during that time or afterwards.* United States v. Maryland Casualty Co., 4 Cir., 299 Fed. 942; Mid City Trust & Savings Bank v. National Surety Co., 202 Ill. App. 6. We decided Cary v. National Surety Co., 190 Minn. 185, 251 N.

W. 123, and Farmers Co-op. Exchange Co. v. U.S.F. & G. Co., 150 Minn., 184 N. W. 792, upon assumption that such was the rule."

"Where there is doubt as to the meaning of such a policy, it is construed in favor of the insured as providing for such coverage. The uniform practice in deference to such rule, when the intention was to limit coverage to losses discovered during the coverage period, or within a certain time thereafter, has been to so provide in express terms in the policy. (Citing cases.)

"* * * The failure to include such a limitation in the policy involved here, should be construed as showing an intention that there was to be none. Although the loss was not discovered until after the coverage period had expired, the policy covered the defalcation in question since it occurred during the coverage period."

Paragraph 5 of Lloyd's policy says: "Warranted free of all claims for losses occurring subsequent to the date of this policy and for losses not discovered during its currency," and if the provision stopped there, it would mean one thing, but immediately follows the qualifying language "with the understanding that in the event of non-renewal, the assured shall have a period equal to that provided by the Discovery clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance." The provision must be construed as a whole, and so construed, gives three years from non-renewal for the discovery of losses occurring within its currency.

The authorities cited by Lloyd's support the judgment of the trial court.

At pages 16 and 17 of appellants' brief are cited Section 1643 of the Civil Code of California, and the cases of

> *Robbins v. Pacific Eastern Corp.,* 8 Cal. (2d) 241, 273 (65 Pac. (2d) 42) and
>
> *Rabbitt v. Union Indemnity Co.,* 140 Cal. App. 575-585, 35 Pac. (2d) 42.

Appellee, likewise, cites these authorities, with particular emphasis on that portion of the quotation in the first cited case (*Robbins v. Pacific etc., supra*), wherein it is said that

> "* * * it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing."

United States Fidelity and Guaranty Company's 1937 Excess Bond Does Not Cover the Losses Here Involved.

On November 1, 1937, U.S.F. & G. issued its bond referred to as its "1937 Bond", whereby it insured Fruit Growers for all losses under that bond, in a sum not exceeding $25,000.00 "in excess of the amount or amounts covered under the primary fidelity suretyship described in Section A, paragraph 2" [Tr. p. 45], which Primary Bond is described as its own "Schedule Bond No. 14815-03-62-12—favor California Fruit Growers Exchange, *et al.*" [Tr. p. 47], which is its bond dated October 23, 1912, and shown at pages 13 to 25, inclusive, of the transcript.

This 1937 Bond, as originally written, covered such excess losses as were sustained "during the term of this bond * * * and while this bond and said primary fidel-

ity suretyship are in force as to such Employee or Employees * * *" [Tr. pp. 45-46.]

The term of the 1937 bond is specified as beginning "with the 1st day of November, 1937, standard time at the address of the Employer above given and ends at 12 o'clock night, standard time as aforesaid, on the effective date of the cancellation of this bond." [Tr. p. 46.] The Primary Bond therein referred to has continued in force ever since its issuance on October 23, 1912.

On January 12, 1938, there was attached to the U.S.F. & G. 1937 bond, a rider which extended the coverage under it so as to cover losses which might have been sustained by Fruit Growers during the currency of Lloyd's policy and which such losses "shall be discovered *after* the expiration of the time limited therein (in Lloyd's policy) for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond (the 1937 U.S.F. & G. bond) for the discovery of loss thereunder." [Tr. pp. 62-63.]

The rider in question reads as follows:

"RIDER

No. 02-308-37 $.....

To be attached to and form a part of Excess Commercial Blanket Bond, (Standard Form AA) No. 14815-02-308-37, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-Five Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, *et al.* (hereinafter called Employer), and dated the 1st day of November, 1937.

Whereas, Lloyds issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective

the First day of November, 1936, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and in favor of the Employer; and

Whereas, the prior bond, as of the effective date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered after the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under the attached bond and the attached bond as extended by this rider,

or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller.

4. That any sum or sums which shall be paid under the attached bond as extended by this rider on account of any loss or losses under the prior bond shall reduce or be deducted from the amount of the attached bond in the same manner and subject to the same conditions and limitations as payments under the attached bonds, but any sum so reducing or deducted from the amount of the attached bond shall be restored thereto as therein provided." [Tr. pp. 62-63.]

Neither this 1937 bond, nor the rider attached to it, nor both taken together, undertook to absolve Lloyd's from liability under the Lloyd's policy, or to take over or assume any liability of Lloyd's. All that was done, or intended to be done, was to extend coverage, under the rider, for losses occurring and sustained during the currency of Lloyd's policy, the right to recover which Fruit Growers may thereafter lose by failure to discover such losses within the time provided in clause 5 of Lloyd's policy, to-wit, within three years from the non-renewal of Lloyd's policy, it having expired by its own limitation on November 1, 1937.

All of the stipulated losses occurred during the currency of Lloyd's policy, that is, between May 1, 1937, and No-

vember 1, 1937. They were discovered on July 31, 1940 [Stipulation, par. 5, Tr. pp. 189-190], which was within the three year period for discovery as provided in Lloyd's policy.

Manifestly, therefore, any claim under the 1937 bond and rider alone, did not mature, for these several reasons:

1. The losses did not occur, or were not sustained, during the currency of that bond, that is, between November 1, 1937, and November 1, 1938;

2. They were discovered on July 31, 1940, which was not within twelve months after the termination of the 1937 bond, which terminated on November 1, 1938, when the 1938 bond was written;

3. The losses were sustained during the currency of the primary bond of U. S. F. & G., issued on October 23, 1912, which was in effect, and during the currency of Lloyd's policy, *viz.*, between May 1, 1937, and November 1, 1937.

4. They were discovered within three years from the non-renewal, on November 1, 1937, of the Lloyd's policy, and not *after* the time for discovery under Lloyd's policy.

5. The agreed losses are recoverable under Lloyd's policy, because they were sustained during the currency of that policy, and during the currency of the primary bond, and within the three year period for discovery, specified in Lloyd's policy.

As to the 1938 Bond of United States Fidelity and Guaranty Company.

On November 1, 1938, U. S. F. & G. issued to Fruit Growers its Excess Commercial Blanket Bond, shown at pages 91 to 121 of the transcript.

That bond is in every essential particular, like the 1937 bond, except as to term of its beginning, being on November 1, 1938. It likewise bore a rider substantially like that attached to the 1937 bond, which rider provides:

> "That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior (1937) bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder and before the expiration of the time limited in the attached bond for the discovery of loss thereunder, provided that such loss or losses would have been recoverable under the prior (1937) bond had it not been cancelled or terminated; and provided further that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date." [Tr. p. 166.]

While the stipulated losses were not discovered within twelve months from the expiration of the 1937 bond and are not therefore recoverable under that bond, the 1938 bond was in force at the time of discovery on July 31, 1940, which carried forward the coverage under the 1937 bond, and, by force of the two bonds of 1937 and 1938, covers the losses involved if, and, only if, they are not recoverable under Lloyd's policy. They are not recoverable under that bond for the simple reason that they were discovered within the period for discovery provided in the Lloyd's policy.

The riders on the U. S. F. & G. bonds are clear and explicit in the provision:

> "That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under the prior bond which shall be discovered *after* the expiration of the time limited therein for the discovery of loss thereunder."

The losses occurred during the currency of Lloyd's policy and having been discovered within the period of three years from its non-renewal, they are recoverable under that policy and not recoverable under the 1937 or 1938 bonds of U. S. F. & G.

The Grammatical Construction Contended for By Lloyd's Is Not Tenable.

Under subdivisions II and IV of their brief, at pages 20, *et seq.* thereof, appellants take occasion to advert to the fact that many of the words used in Lloyd's policy, begin with capital letters, and that, among others, the words "Discovery Clause" are thus capitalized, and say that it obviously refers to a particular thing, and then inquire what becomes of those words, if there is no discovery clause in the primary bond.

To this it is replied that Lloyd's themselves, by the very language of their policy recognize that there was a period after the non-renewal of their policy, within which losses occurring during its currency may be covered and become "claimable under this Insurance," and when we consider that it is stipulated that, "It is to be legally inferred that at the time Lloyd's issued its excess policy, Lloyd's was familiar with the terms and conditions of the primary bond of U. S. F. & G." [Tr. p. 191], appellee wonders and

inquires if Lloyd's, at that time, had it in mind to so frame its own Discovery Clause as to make it meaningless, and so that there never could be any liability on Lloyd's for losses incurred during its currency, but not discovered during such currency?

It is to be assumed, in the absence of evidence to the contrary, that the premium paid for Lloyd's policy was commensurate with the coverage afforded or intended to be afforded thereby. Let us then assume that at the time of the presentation to Fruit Growers of Lloyd's policy, Fruit Growers had inquired of Lloyd's to say, just what does this discovery clause 5 in your policy mean? We think it fair to assume that Lloyd's would not then have said, as they now say, in substance, at page 23 of their brief:

> "This phrase is designed to cover the situation, if the primary policy contains a Discovery Clause. But if the primary policy does not contain a Discovery Clause, then the concluding clause in our policy is inoperative."

On the contrary, it is fair to assume that Lloyd's would, in response to such an inquiry, have said:

> "We are familiar with your primary bond. This provision is clear to the effect that you have a period not exceeding three years from the non-renewal of Lloyd's policy within which to discover losses occurring during the currency of Lloyd's policy, and if so discovered they are claimable under this insurance."

And, in the absence of just such a statement, it is not difficult to surmise that Lloyd's policy would never have been accepted. Such a construction comports with the language used and no other construction does.

The Losses Are Recoverable Under the Lloyd's Policy and Not Under Either the 1937 or 1938 Bonds of U. S. F. & G.

The losses occurred during the currency of Lloyd's policy. They were discovered within the time provided in that policy for their discovery. As the 1937 bond excluded coverage for losses sustained during the currency of Lloyd's policy and within the period provided therein for discovery, likewise the 1938 bond excluded coverage during the same period, and the losses are not recoverable under either the 1937 or 1938 bonds of U. S. F. & G., but are recoverable under the Lloyd's policy.

The following authorities demonstrate that there is no liability on U. S. F. & G. under the facts as they exist in the instant case.

In *London & Lancashire Ins. Co. v. Peoples Nat. Bank, etc.,* 59 Fed. (2d) 149, there was involved an identical situation as is involved under each of the bonds of United States Fidelity and Guaranty Company. There Metropolitan Casualty Insurance Company issued a fidelity bond covering losses sustained during its currency and discovered within two years after its termination. The bond was superseded by one executed by London & Lancashire Insurance Company, and upon the latter becoming effective, the Metropolitan bond was cancelled and a rider was attached to the new bond, which, after reciting that the period bond "may provide that any loss thereunder shall be discovered or claim therefor shall be filed, within a certain period after the final expiration or cancellation thereof" it is understood and agreed that the new bond should cover losses under the prior bond which shall be discovered *after* the expiration of the period for discovery, or,

if no such period, after the bar of the statute of limitations and before the expiration of the time limited in the new bond for discovery of losses under it, and which would have been recoverable under the prior bond if it had not been terminated. The language is almost identical with that contained in the 1937 and 1938 bonds of United States Fidelity and Guaranty Company. The Court says (p. 151):

> "A careful study of the rider convinces us that appellant did not thereby undertake the assumption of any and all liability which might accrue under the Metropolitan contract, but only such as, accruing while the Metropolitan contract was in force, would not, under that contract, be enforceable if not discovered within two years after the Metropolitan contract was terminated. By the terms of that contract, a loss occurring while it was in force would be recoverable if discovered within two years after termination of the contract; but if discovered more than two years after termination, no action would lie. Had the contract remained in force, the right of discovery would have persisted until the loss was discovered. Therefore, in canceling the Metropolitan contract the bank was deprived of the right of recovery for a loss occurring thereunder which was not discovered within two years after the cancellation. The new bond carried no indemnity against loss accruing prior to the issue, but not discovered within two years after the termination of the prior contract, that the rider was attached."
>
> * * * * * * * *
>
> "This alleged loss having been discovered by the indemnified bank within two years after the cancellation of the Metropolitan contract, it follows that it

is not a loss for which appellant, by its rider, assumed to indemnify appellee, and it was not recoverable against appellant. It will therefore be unnecessary to inquire into the merits of the contention respecting Maple's alleged dishonest acts as the cause of that asserted item of loss."

In *Hartford Acc. & Ind. Co. v. Collins-Dietz Morris Co.,* 80 Fed. (2d) 441, a similar rider was involved. At page 445, the Court says:

"The rider in question applies only to shortages which occurred during the currency of the bond of 1929 and which were discovered *more than* two years after that bond terminated. In other words, it applies exclusively to losses which were sustained prior to October 1, 1932."

Citing:

London & Lancashire Inc. Co. v. Peoples Nat. Bank, supra (50 Fed. (2d) 149);

Maryland Casualty Co. v. First Nat. Bank, 246 Fed. 892;

Hartford Acc. & Ind. Co. v. Collins-Dietz, etc., 80 Fed. (2d) 441.

In the last case cited, Metropolitan Casualty Insurance Company executed a fidelity bond dated March 4, 1927, which expired October 1, 1929. On October 1, 1929, Hartford Accident and Indemnity Company executed its bond, which terminated October 1, 1930. This bond covered losses occurring while it was in force and discovered within two years after its termination.

To this latter bond a rider was attached providing that the bond to which the rider was attached, should cover

losses covered under the Metropolitan bond "which shall be discovered after the expiration of any such period, or, if there be no such period, after the bar of the statute of limitations, and before the expiration of the time limited in the attached bond for loss thereunder—and which would have been recoverable under said fidelity suretyship (the Metropolitan bond) had it continued in force and also under the attached bond had such loss or losses occurred during the currency thereof."

A third bond was executed by the Hartford Company on October 1, 1930, which terminated one year later. Its material provisions were identical with those contained in the previous bond, except that it referred to the previous bond of the same company. Of this rider the Court said (p. 245):

> "The rider in question applies *only* to shortages which occurred during the currency of the bond in 1929 and which were discovered *more than* two years after that bond terminated. In other words, it applies exclusively to losses which were sustained *prior* to October 1, 1930, and which were not discovered until *after* October 1, 1932. Maryland Casualty Company v. First National Bank (C. C. A.), 246 Fed. 892; London & Lancashire Indemnity Co. v. Peoples National Bank (C. C. A), 59 F. (2d) 149. There were no such shortages. All shortages were discovered before October 1, 1932."

Maryland Casualty Co. v. Tulsa, etc., 83 Fed. (2d) 14, cites *Hartford v. Collins-Dietz, supra,* and says:

> "The rider has exclusive reference to losses which were suffered during the existence of the first bond and discovered more than two years after its termination. The limitation is a part of the rider and is

likewise limited to losses of that kind. There are no such losses here. All of these losses were discovered less than two years after the first bond was terminated and for that reason no recovery is sought under the terms of the rider. Accordingly, the rider including its fixation of maximum recovery has no effect here. We so held quite recently in construing an appended rider identical in all respects with this one. Hartford Accident & Indemnity Co. v. Collins-Dietz-Morris Co (C. C. A.), 80 Fed. (2d) 441."

As to Appellants' Contention of Contemporaneous Construction.

This argument under subdivision II of appellants' brief (p. 10), is evidently based upon the fact that the superseded suretyship rider attached to the 1937 bond was placed thereon some time after the bond was issued, and appellants challenge appellee to answer the argument.

No difficulty is encountered in this respect. The assumption that the placing of the rider on the bond amounted to a construction that there was no liability under Lloyd's policy, is wholly unwarranted. There is no evidence on the question whatever, and it is of no concern whatever to Lloyd's what either the Fruit Growers or U. S. F. & G., or both of them, thought about Lloyd's policy when or before the rider was attached. Their thoughts upon the matter could not change Lloyd's position or liability in any respect. The rider does not change or seek to change any of the provisions of Lloyd's policy. Lloyd's obligation under its policy remained the same at

the time the rider was attached as it was, and is, both before and since that event. It is quite as tenable to argue that both the Fruit Growers and U. S. F. & G. may have first thought that the three year period for discovery of losses was sufficient to protect against reasonable eventualities. It may have been that it was a pure oversight in not placing the rider on the bond at the time it was written. It may as well have been that there was a question of premiums to be paid, depending upon the extent of coverage to be extended by U. S. F. & G. From whatever angle the matter is to be approached, it amounts to nothing more than that for the period during which there was no rider on the bond, United States Fidelity and Guaranty Company had not bound itself to assume any liability for losses occurring during the currency of Lloyd's policy, no matter when they were discovered, and that after the affixing of the rider, it did assume the limited liability for such losses as were discovered *after* the expiration of the period of discovery provided in Lloyd's policy. But all these assumptions, we repeat, never prejudiced or advantaged Lloyd's in any manner or to any extent.

The proposition advanced and the authorities cited by appellants at pages 18 and 19 of their brief, can have no possible application here, for the obvious reason that Lloyd's liability was not in any manner affected by any bond or bonds thereafter issued by U. S. F. & G. and Lloyd's policy must stand or fall upon the purpose and intent and as expressed therein.

The Construction of Lloyd's Policy Contended for by Appellants Is Untenable and Not Supported by Any Authorities.

As this question is discussed by appellants under divisions II and III of their brief, appellee will direct its reply thereto under the above caption.

Appellants do not deny that it was the purpose and intent of Lloyd's policy to furnish and afford to Fruit Growers insurance or indemnity for losses in excess of the coverage of $1,000.00 under the primary bond of U. S. F. & G. and occurring or sustained during the period from November 1, 1936, to November 1, 1937.

But it is contended that the clause or provision of that policy, numbered 5, should be so construed as to reject and hold meaningless all of that clause or provision except so much thereof as reads:

> "Warranted free of all claims for losses occurring subsequent to the expiry date of this Policy and for losses not discovered within its currency."

Appellee submits that according to the provisions of the Civil Code and Code of Civil Procedure of California, cited by appellants at pages 20 and 21 of their brief, when applied to the facts of this case, lead only to the conclusion that the construction of this clause as found by Judge Hollzer, is correct.

The case of *Loyalton, etc. v. California, etc.*, 22 Cal. App. 75 (133 Pac. 323), cited by appellants, did not involve a contract of insurance such as is here involved, and a reading of that case will disclose that the court did not there read out of the contract in question any of its provisions.

Turning, then, to those authorities cited on page 30 of appellants' brief, there can be no question but that the courts have upheld discovery clauses in fidelity insurance contracts, and that is precisely what the trial court did in the instant case, and correctly so.

The cases cited by appellant at page 30 of their brief hold nothing more than that discovery clauses do not contravene any public policy, and that recovery will be allowed when discovery is made within the period prescribed, or denied if they are not so discovered. Lloyd's inserted in their policy a provision for the discovery of losses but now seeks to avoid it by argument that it does not say what it means, or mean what it says.

And appellee subscribes to the correctness of the rule laid down in 23 *Cal. Jur.* 758, section 133, as set forth on pages 31 and 32 of appellants' brief, when applied to the construction of statutes or code sections, and applying the same principles to an insurance contract, the court will apply the rule that the contract is to be construed as a whole, so as to give meaning and effect, not only as a whole "but to each and every part thereof—*i.e.* to every word and clause, and certainly to every distinct or coordinate provision or section"; that such meaning must be given, if possible, as will permit the whole to stand "and leave no part useless, or deprived of all sense and meaning"; that words are not considered unnecessary or as surplusage, and that "each and every word or clause was inserted for some useful and sensible purpose."

Appellants, at page 35, cite the case of *American Employers' Inc. Co. v. Roundup Coal Mining Company*, 73 Fed. (2d) 592. In that case the insurance company contended that a prior company could not limit the time for

discovery to two years by reason of a Nebraska statute, and the court held that the statute did not apply and there was nothing in it "to prohibit an insurance company from limiting its coverage to losses incurred during the life of the policy and discovery within two years thereafter." (Page 594.) There the defendant was held liable under a provision in its policy covering losses discovered after the period of discovery in the prior policy, it being apparent from the decision that it did not involve losses discovered within the time limited in the prior policy, as in the instant case.

The case of *Caldwell v. Center,* 30 Cal. 539, cited by appellants, has no bearing upon the instant case. In the first place, it did not involve an insurance policy, to which the rules of construction, as herein set forth, are applied. In the next place, it did not really involve the construction of a contract at all, except so far as to whether, under the contract, certain evidence was admissible. This is made clear from the quotations from the case as set out in the brief of appellants. There, a deed referred to a map recorded in the Recorder's office, which the Court found was not sufficient to describe the premises, and as the Court says:

> "The only evidence introduced by the plaintiff for this purpose was a map from the Recorder's office and a map from the Surveyor's office, *and parol testimony* in explanation of the last map. The defendant objected to the map from the Recorder's office on the grounds, among others, that 'it was made with pencil and not with ink', and that 'it was pasted in between the leaves of the book, but not recorded.' The court holds that the objection should have been sustained."

As opposed to the authorities cited and the argument advanced by appellants, appellee directs attention to the following:

In *Hartford Acc. & Ind. Co. v. Swedish Methodist Assn.*, 92 Fed. (2d) 649, at 651, provisions of a policy of fidelity insurance were involved, and there contentions similar to those of Lloyd's were made, and the Court said:

> "By the paragraph first referred to, appellant assumed certain obligations arising by reason of the first bond, and in the next paragraph disclaimed such obligations; by the former paragraph certain rights were bestowed upon the insured, and by the latter paragraph they were denied. Just why an instrument so confusing and contradictory in its terms should be employed, we do not know, and do not care to hazard a guess. *If the rider means what is claimed by appellant, it seems it would have been a rather easy matter to have so stated in terms which could be readily understood.*"

Appellants appear to concede that the entire clause 5 of their policy is to be construed together, but, in the same breath, they seek to divide that clause into subdivisions in such a manner as to utterly read out of it all of its substance, and so as to destroy the provision entirely, when if it was intended to be construed as now contended for, it would have been very easy to have said so in language that could not have been misunderstood, and in which event it may be reasonably assumed that the Fruit Growers would not have accepted the policy. It is submitted that no authority cited by appellants sustains their contention.

If it had been the intention of Lloyd's and Fruit Growers that the provision in Lloyd's policy should be construed as now contended for, then, as suggested in the *Hartford* case, *supra,* "it would have been a rather easy matter to have so stated in terms which could be readily understood," and in that event the provision would have read, "Warranted free of all claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency," and have stopped there.

Again, as opposed to the authorities cited by appellants, the following are of interest:

In *Stein v. Archibald,* 151 Cal. 220, at page 223, it is said:

> "It is a well settled principle, applicable to the construction of contracts, that when one construction would make the contract unreasonable, unfair or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair and just, that the latter construction is the one which must be adopted."

This case was cited to the same effect in *Stoddard v. Holden,* 179 Cal. 663, at 665, and *Van Demark v. California etc.,* 43 Cal. App. 685, at 690.

In *California R. Co. v. Producers R. Corp.,* 25 Cal. App. (2d) 104, it is said, at page 107:

> "It is true, as stated in section 1641 of the Civil Code, that the whole of a contract should be construed together, so as to give effect to every part thereof, if it is reasonably practical to do so. And Section 1858 of the Code of Civil Procedure provides that:

> " 'In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and when there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.' "

Applying the rules, the provision shows a clear purpose and intent to afford a discovery period of not to exceed three years from the expiration of Lloyd's policy, and to distort or reject all that follows what is termed the main clause would be neither fair nor just.

As suggested, it never was intended by Lloyd's to so frame its policy as to deny coverage of a loss sustained on the last day of the policy, because it was not also discovered on that day, but was intended to extend coverage for not to exceed three years from the non-renewal of its policy.

The Rules of Construction of Lloyd's Policy Are Applicable, Notwithstanding the Relations of the Parties to This Controversy.

The final contention of appellants is that it is not open to U. S. F. & G. to urge the usual, ordinary and well established rules that must be applied when considering the provisions of Lloyd's policy.

The case of "*The Grecian*," 78 Fed. (2d) 657, is cited in support of the contention.

As applied to the facts in that case, no fault can be found with the cited quotation therefrom, but it has no application to the situation here presented. As we read that case, it was one in which one vessel, or the owners

thereof, and of the cargo, sought to recover from a colliding vessel the value of the cargo lost, in other words, a negligence action. The respondent vessel sought to defend upon the ground, among others, that the complaining vessel, or its owners, did carry or were required to carry insurance upon the cargo. The Court did use the language quoted by appellants at pages 39 and 40 of their brief. But in doing so, the Court went no further than to apply the familiar rule that when one whose property is damaged or destroyed by another, the offending party may not show the carrying of insurance by the injured person to avoid his own tort liability. That situation does not obtain here. Neither U. S. F. & G. nor Lloyd's is seeking to recover from the other. This is not a tort action. It is a declaratory action brought by Fruit Growers to determine which of the defendants is liable to Fruit Growers for a loss sustained by it. And if it is not competent for U. S. F. & G. to urge the rules by which Lloyd's policy is to be construed, then by what right does Lloyd's argue or urge the construction of U. S. F. & G. bonds?

Answering the argument of Lloyd's, at pages 38 and 39 of their brief, that the rules of liberal construction should be equally applied to Lloyd's and to U. S. F. & G., appellee submits that the riders attached to its bonds are clear, definite and unequivocal, showing without ambiguity when liability is to be assumed for losses occurring during the currency of Lloyd's policy.

The clear and concise provision of the riders attached to the excess bonds of U. S. F. & G. is that that Company is not liable to Fruit Growers for any loss sustained by Fruit Growers during the currency of Lloyd's policy and discovered within the period for discovery under Lloyd's policy. It did not undertake to relieve or release Lloyd's from any liability, but left that liability to rest where Lloyd's placed it by their policy. The only time when there could be any liability on U. S. F. & G. for losses occurring during the currency of Lloyd's policy was in the event Fruit Growers should fail to discover such losses within the period for discovery, as provided in Lloyd's policy, and had thus lost its right of recovery against Lloyd's. That eventuality never happened, and thus no liability has ever attached to U. S. F. & G., but rests where it always has rested, upon Lloyd's alone.

The authorities cited herein clearly and beyond question definitely impose liability upon Lloyd's and as clearly and definitely exonerate U. S. F. & G. from liability.

And replying to the conclusion of appellants that to hold Lloyd's liable is to attribute to U. S. F. & G. the doing of a useless and meaningless act, appellee replies that if the stipulated losses had been discovered subsequent to the expiration of three years from the non-renewal of Lloyd's policy, U. S. F. & G. would have been responsible for them under its 1938 bond, but they were not so discovered.

As to the Brief of Appellee, California Fruit Growers Exchange.

It correctly and properly shows the position of Fruit Growers in this case and correctly sets forth the effect of the stipulations entered into and that judgment was entered pursuant to the stipulations. U. S. F. & G. abides by the stipulations and submits that the judgment against Lloyd's should be affirmed.

Conclusion.

In conclusion appellee submits:

1. That the single question to be determined is the purpose, intent and effect of clause 5 contained in Lloyd's policy.

2. To hold and construe that clause as contended by Lloyd's renders it repugnant to the evident and expressed purpose and intent of Lloyd's to provide a period beyond the non-renewal of Lloyd's policy, within which Fruit Growers might discover losses sustained during the currency of that policy and make them "claimable" under the policy as expressed in the clause.

3. That the stipulated losses, having been suffered or sustained during the currency of Lloyd's policy and having been discovered within three years from the non-renewal of Lloyd's policy on November 1, 1938, renders Lloyd's liable therefor and gives effect to all and each part of clause 5.

4. To hold U. S. F. & G. liable would be to construe the riders to its bonds as covering losses never intended to be covered, it having agreed to become liable for losses sustained under Lloyd's policy only in the event of their discovery after, and not within, the three year period for discovery as provided in Lloyd's policy.

5. To absolve Lloyd's from liability would mean that they received a premium for an obligation covered by their policy and which they now seek to repudiate.

6. And the judgment of the trial court should be affirmed.

Respectfully submitted,

MILLS & WOOD,

By EDWARD C. MILLS,

Attorney for Appellee, United States Fidelity and Guaranty Company.

No. 10287

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

CHAS. E. R. FULCHER,
823 Title Guarantee Building, Los Angeles,
Attorney for Appellants.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

CASE CITED.

No. 10287

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

We have carefully examined the Answering Brief of Appellee, United States Fidelity and Guaranty Company, and we believe that in all probability it would be unnecessary to reply thereto at all, since we respectfully submit that appellee has totally failed to answer and meet the propositions presented in our Opening Brief, but out of an abundance of precaution we shall answer one or two matters suggested in appellee's brief.

Reply to Appellee's Point I.

As we understand appellee's discussion under this heading, it contends that a very liberal construction should be given to Lloyd's bond, since it was a fidelity bond, and by this discussion attempts to single out only Lloyd's bond, wholly ignoring the fact that U. S. F. & G.'s bond was also a fidelity bond, and that the action here was not against Lloyd's alone, but was against both Lloyd's and U. S. F. & G., and the transactions are wholly and completely interwoven one with the other.

We pointed out under Point V, beginning at page 38 of our Opening Brief, that the real controversy was not between Fruit Growers and the two bonding companies, but was in fact a controversy between U. S. F. & G. and Lloyd's, and that as a consequence rules of construction which have been applied between an assured and an insurance company, would have no application here.

We have no quarrel with the authorities cited in appellee's brief upon this subject, but do not consider them applicable, but if they are applicable it does not change the situation, since the Court is not here concerned with the applicability of those rules only as to Lloyd's, but they must be applied with equal force to the bond of U. S. F. & G., and when they are applied with equal force, as we have stated in our Opening Brief, the burden certainly will fall more heavily upon U. S. F. & G. than it will upon Lloyd's. In other words, the Court must take all of these documents and the facts and circumstances in relation thereto, and consider them as a whole, and not merely single out Lloyd's bond as the only one to be

construed or considered. When this is done it will be seen that U. S. F. & G.'s superseded suretyship rider must be construed as having been intended by the parties to have some force and effect, and the only force and effect it could have, would be existent if Lloyd's bond is construed in the manner contended for by appellant, or in other words, if it is construed exactly in the manner in which the language contained therein requires it to be construed.

At page 11 appellee states that Lloyd's is contending that Clause 5 should be broken up, so as to render utterly devoid of any meaning and purpose whatsoever the "Main Clause" mentioned in our brief at page 32.

Either we have failed to clearly express ourselves, or appellee has failed to carefully examine our contention, as set forth in the brief. For that reason we have reread it, and believe that it is clear, when carefully examined, that we are not under any circumstances contending that the language of the "Main Clause" is wholly devoid of any meaning.

We have not contended and do not now contend that any of the language contained in Clause 5 was wholly meaningless. We thought we had made it clear that we contend that every bit of it had meaning and effect, and that although portions may, under certain circumstances, become inoperative by reason of the absence of a Discovery Clause in the Primary Bond, this does not render any portion of the clause utterly invalid and meaningless, but if the Court should construe the clause in the manner contended for by U. S. F. & G., it would render a portion of the language utterly meaningless and useless.

Reply to Heading, "The Grammatical Construction Contended for by Lloyd's Is Not Tenable."

Under this heading appellee argues that Lloyd's, by the very language of their bond, recognize that there was a period after the non-renewal of their bond, within which losses occurring during its currency, may be discovered, and become "claimable under this Insurance," and state in substance that Lloyd's, at the time they framed their own Discovery Clause, so framed it as to make it meaningless and so that there could be no liability on Lloyd's for losses incurred during its currency, but not discovered during such currency.

While this subject is quite fully covered in our Opening Brief we might pause to mention the fact that what Lloyd's meant, must be determined by the language of their bond, and the same rule must apply to U. S. F. & G.'s bond, and as we have pointed out in our Opening Brief, U. S. F. & G.'s own bond contained a similar clause, which would make its Discovery Clause meaningless insofar as the excess bonds were concerned, and it is perfectly obvious that both Lloyd's and U. S. F. & G.'s form is designed to fit any circumstances which may arise, and that uniform clauses are printed in the bonds, so as to make them applicable under any circumstances.

Certainly it does not lie in the mouth of U. S. F. & G. to suggest anything to the contrary, when their own bond contained a similar provision, which we have printed in our Opening Brief, when they caused such a clause to be inserted, with full knowledge of each and all of the terms of the Primary Bond, which bond they themselves had written.

Appellee follows this by assuming that which is not in evidence, and presents a speculative argument upon what Lloyd's would have said if inquiry were made as to the meaning of its terms and conditions, which argument of course is not supported by any authorities or any principle or rule of law or construction.

Reply to Heading "As to Appellants' Contention of Contemporaneous Construction."

Appellee first assumes that which is not correct, by stating that appellant's argument under Subdivision II was evidently based upon the fact that the superseded suretyship rider attached to the 1937 bond, was placed thereon some time after the bond was issued.

It is true that we did make the statement that it was placed thereon at a later date, but our argument is not based entirely upon that proposition. It would have mattered not, whether it was placed thereon at the very time the original bond was written, or at a subsequent date. Our purpose in inviting the Court's attention to the fact that it was placed thereon at a subsequent date. fortifies the inference that an additional premium was charged for such superseded suretyship rider. If the rider had been placed on there in the first instance we do not doubt but what U. S. F. & G. would claim, although such claim might be untenable, that this was just a customary rider placed on all such surety bonds, and thus attempt to weaken its significance, but even if it had been placed there at the time the bond was originally written, the Court would have no right to indulge in the belief that it was merely a part of the customary procedure, and would, we submit, have to presume that it was not intended as a useless act.

What we did say, and what we do contend, is, that in order to hold Lloyd's liable in this case, it is necessary to say that U. S. F. & G. and Fruit Growers performed a useless and meaningless act, by attaching to the bond which was written, a superseded suretyship rider for which U. S. F. & G. charged a premium, although that document could never have any effect whatsoever.

We challenged U. S. F. & G. to answer our argument under Point II, and to explain the purpose of such rider, and its acts in connection therewith, and we respectfully submit that they have totally failed to meet this challenge.

They state:

> "From whatever angle the matter is to be approached, it amounts to nothing more than that for the period during which there was no rider on the bond, United States Fidelity and Guaranty Company had not bound itself to assume any liability for losses occurring during the currency of Lloyd's policy, no matter when they were discovered, and that after the affixing of the rider, it did assume the limited liability for such losses as were discovered after the expiration of the period of discovery provided in Lloyd's policy."

This argument on appellee's part is exactly in accordance with the contention made by these appellants.

They now admit, in their brief, that they assumed a liability by the superseded suretyship rider, for losses discovered after the expiration of the period of discovery in Lloyd's bond.

Now, since their bond was only effective for one year, and consequently the superseded suretyship rider attached thereto could only be effective for one year, it is obvious that if what appellee says is true, the judgment must be reversed as to Lloyd's, for the only way they could assume any liability under that particular bond, for losses occurring during the currency of Lloyd's bond, would be if Lloyd's had no liability for any losses which occurred subsequent to its expiry date, and as we have stated, if your Honorable Court construes Lloyd's bond as creating a liability for discoveries made up to three years from its expiry date, then U. S. F. & G. assumed no liability of any kind or nature by virtue of its superseded suretyship rider.

We are of course indebted to U. S. F. & G. for their admission in this particular, since it seems to be decisive of the question which we have presented, and must of necessity, if followed, result in a reversal of the action as against Lloyd's.

Reply to Points Under Heading "The Construction of Lloyd's Policy Contended for by Appellants Is Untenable and Not Supported by Any Authorities."

Under this heading, at page 31, appellee says that we have requested the Court to construe paragraph 5 so as to reject and hold meaningless all of that clause or provision, except so much thereof as reads:

> "Warranted free of all claims for losses occurring subsequent to the expiry date of this Policy and for losses not discovered within its currency."

This is not exactly true; that is to say, we do not ask the Court to hold the balance of that clause meaningless and to reject it. What we do say is, that it is merely inoperative. It had a meaning and purpose, but its operative force depended upon the existence of a Discovery Clause in the primary bond, and since there was an absence thereof the clause never became operative, or as we have said, it is analogous to a constitutional provision which is not self-executing, but which requires an act of the Legislature to make it operative. Under such circumstances the constitutional provision is not meaningless, and need not be rejected. It merely remains inoperative.

Appellee cites *Hartford Acc. & Ind. Co. v. Swedish Methodist Assn.,* 92 Fed. (2d) 649, at 651, and quotes a clause from it, stating that the contentions made by Lloyd's in the instant case, were made by Hartford in that case.

This is not a correct statement of the decision, as will be seen even by a cursory examination of it.

In that case there was involved purely the construction of two bonds which contained superseded suretyship riders. The Court concerned itself with trying to construe the superseded suretyship rider, and did use the language which is quoted on page 34 of appellee's brief. No clause of the kind or nature written by Lloyd's, and which is under consideration here, was in anywise involved in that case. However, there was involved a superseded suretyship rider containing similar language as that of U. S. F. & G.'s rider, which is involved here, and it was in relation to that clause that the Court was speaking in the quoted language.

Appellee further argues that appellants concede that the entire Clause 5 of its bond should be construed together, and in the same breath seek to divide that clause into subdivisions in such a manner as to utterly read out of it all of its substance and to destroy the provision entirely, when if it was intended to be construed as now contended for, it would have been very easy to have said so in language which could not have been misunderstood.

We submit that this statement is not correct, and that the language is clear and definite, and that we can conceive of no reason why appellee cannot understand it, since it is couched in fixed and definite language, and conforms exactly to the rules of grammar which are uniformly recognized, and as we have stated, we do not ask that any part of the clause be destroyed. We merely request the Court to hold that it means what it says.

Conclusion.

We respectfully submit that there has been a total failure on the part of appellee to answer the contentions set forth in Lloyd's opening brief; that the judgment as to Lloyd's should be reversed, and the Lower Court directed to enter judgment against U. S. F. & G. for the full amount of $22,019.22, together with interest thereon from the date the judgment herein was entered.

Respectfully submitted,

CHAS. E. R. FULCHER,

Attorney for Appellants.

No. 10290

10

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN WILLIAM WESTENRIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

ROTARY COLORPRINT. 590 FOLSOM ST., SAN FRANCISCO

No. 10290

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN WILLIAM WESTENRIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

ROTARY COLORPRINT. 590 FOLSOM ST., SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

Index Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Appellant:

WM. L. HACKER, Esq.,
6 West Commercial Row,
Reno, Nevada.

M. B. MOORE, Esq.,
103 Mill Street,
Reno, Nevada.

For the Appellee:

THOMAS O. CRAVEN, Esq.,
United States Attorney,
Post Office Building,
Reno, Nevada.

BRUCE R. THOMPSON, Esq.,
Assistant U. S. Attorney,
Post Office Building,
Reno, Nevada.

WM. J. KANE, Esq.,
Assistant U. S. Attorney,
Post Office Building,
Reno, Nevada. [1*]

---

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States of America, in and for the District of Nevada

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR L. NOBLE and JOHN WILLIAM WESTENRIDER, alias JOHN LEVI,

Defendants.

INDICTMENT FOR VIOLATION SECS. 76 and 88, T. 18, U. S. C. A.

United States of America,
District of Nevada—ss.

Of the May 1942 Term of the District Court of the United States of America, in and for the District of Nevada;

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That John William Westenrider, alias John Levi, whose other or true name is to these Grand Jurors unknown, did, on or about the 14th day of June 1942, at Carson City, in the State and District of Nevada, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously, with the intent in him then and there to defraud one Elizabeth E. Lund, falsely assume and pretend to

be an officer or employee acting under the authority of the United States, to-wit: a government investigator and inspector investigating [2] alleged violations of the Federal Housing Administration laws and regulations, and at said time and place and in such pretended character, said John William Westenrider, alias John Levi, did attain from said Elizabeth E. Lund a paper or document, to-wit: a check drawn by said Elizabeth E. Lund to the order of Edgar L. Noble for the sum of $167.00.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

Count II

That John William Westenrider, alias John Levi, and Edgar L. Noble, whose other or true names are to these Grand Jurors unknown, did, on or about the 14th day of June, 1942, at Carson City, in the State and District of Nevada, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously, combine, conspire and confederate with each other to commit an offense against the United States in this: that it was a part of said unlawful and felonious combination, conspiracy and confederacy, that said defendant John William Westenrider, alias John Levi, with the intent in him and in said Edgar L. Noble, then and there to defraud one Elizabeth E. Lund of the sum

of $167.00, lawful money of the United States, should falsely assume and pretend that he, the said John William Westenrider, alias John Levi, was an officer and employee acting under the authority of the United States, to-wit: a Government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations, and that he, the said John William Westenrider, alias John Levi, [3] should take it upon himself to act as such officer and employee, and in such pretended character should demand and obtain from said Elizabeth E. Lund said sum of money.

That pursuant to said unlawful confederacy, combination and conspiracy, and for the purpose of carrying out the objects thereof, said defendants committed the following overt acts:

1. That on or about the 14th day of June, 1942, at Carson City, Ormsby County, State and District of Nevada, John William Westenrider, alias John Levi, and Edgar L. Noble, accompanied one another in an automobile to 204 South Division Street, Carson City, Nevada.

2. That on or about the 14th day of June, 1942, at Carson City, Ormsby County, State and District of Nevada, the defendant John William Westenrider, alias John Levi, falsely assumed and pretended to be an officer and employee acting under the authority of the United States, to-wit: a Government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations.

3. That on or about the 15th day of June, 1942, at Carson City, Ormsby County, State and District of Nevada, John William Westenrider, alias John Levi, demanded that Elizabeth E. Lund, deliver to Edgar L. Noble a check drawn by said Elizabeth E. Lund to the order of Edgar L. Noble in the sum of $167.00.

4. That on or about the 15th day of June, 1942, at Reno, Washoe County, State and District of Nevada, John William Westenrider, alias John Levi, and Edgar L. Noble, transferred and delivered said check drawn by said Elizabeth E. Lund to the order of Edgar L. Noble in the sum of $167.00, [4] to one F. W. Buchanan and received money and credits from said F. W. Buchanan in return therefor.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

THOMAS O. CRAVEN,
United States Attorney.
By BRUCE R. THOMPSON,
Ass't. U. S. Attorney.

A True Bill:

C. A. BROWN,
Foreman.

[Endorsed]: Filed Sept. 2. 1942. [5]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Saturday, September 12, 1942

No. 10,556

[Title of Cause.]

The defendant John William Westenrider appears this day in open court and states his attorney, I. A. Lougaris, is not present and waives services of an attorney for arraignment. Thereupon the said defendant is duly arraigned upon the indictment herein as required by law. He declares his true name to be John William Westenrider and enters a plea of not guilty. It Is Ordered that this case be, and it hereby is, set for trial for September 24, 1942, at Carson City, Nevada, subject to the further order of the Court. The defendant is released on bond heretofore filed herein. * * * [6]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, September 19, 1942

No. 10556

[Title of Cause.]

Upon motion of the U. S. Attorney, It Is Ordered that the setting of September 24, 1942, for the trial of this case be, and the same hereby is, vacated and the case is reset for trial September 29, 1942, at ten o'clock A. M., at Carson City, Nevada. [7]

[Title of District Court and Cause.]

MOTION FOR DIRECTED VERDICT

And Now Comes the defendant, John William Westenrider, and moves that the Court will order a verdict of "Not Guilty" as to him on the crime alleged in the indictment, upon the ground that there is not sufficient evidence to warrant his conviction, and on the ground that the Government has failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; and on the ground that the Government has failed to prove any criminal intent on the part of the defendant; and on the ground that the evidence adduced on behalf of the Government is as consistent with innocence as with guilt and is insufficient to sustain a conviction.

/s/ WM. L. HACKER,
Attorney for Defendant.

[Endorsed]: Filed Sept. 29, 1942. [8]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Tuesday, September 29, 1942
No. 10,556

[Title of Cause.]

This being the time heretofore fixed for the trial of John William Westenrider and the same coming on regularly this day, Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on be-

half of the plaintiff; and Wm. L. Hacker, Esq., for the defendant,—the defendant also being present. Both parties ready. Mr. Hacker asks that this case be reported at the expense of the defendant. It Is So Ordered. The following named jurors are accepted by the parties and duly sworn to try the issue, viz: Edward M. Johnson, Perry W. Hayden, Francis M. Young, J. A. Burt, James K. Hickey, Melio Maionchi, Fred W. Steiner, Jr., John H. Wichman, Geo. W. Friedhoff, James M. Byrne, Leland K. Bright and Melvin J. Fodrin. At 11:15 A. M. the jury panel is exhausted. It is Ordered that the Marshal summon five additional talesmen to appear at 1:30 o'clock P. M. today. It Is Further Ordered that the Marshal notify August A. Glanzman, a juror excused to call, to appear at 1:30 P. M. today. Mrs. Marie D. McIntyre, Official reporter, is called to report this case at the expense of the defendant. Recess is declared to 1:30 o'clock P. M. At 1:30 o'clock P. M. all present, including 5 talesmen, viz: W. H. Orton, George B. Russell, Melvin J. Fodrin, Ray Workman and A. B. Deady. Leland L. Bright and August A. Glanzman, jurors on the regular panel, also answer to their names. [9] The names of Leland K. Bright and August A. Glanzman are placed in the jury box and the Clerk proceeds to draw additional names of prospective jurors. The five talesmen names are now placed in the jury box and the clerk proceeds to draw additional names of prospective jurors. The indictment is read to the jury by the Clerk and the plea of the defendant stated. Mr. Thompson

makes opening statement. Elizabeth E. Lund is duly sworn and testifies for and on behalf of the plaintiff, during which a book containing a copy of a "Contract and/or Order" signed by Elizabeth E. Lund is marked Plff's. Ex. No. 1 for Identification. Mr. Thompson offers in evidence the copy of contract marked Plff's. Ex. No. 1 for Identification, which is admitted and ordered marked Plff's. Ex. No. 1. At the request of Mr. Thompson an F. H. A. Title 1 Loan Document with a printed warning thereon is marked Plff's Ex. No. 2 for Identification, offered in evidence, which is admitted, and ordered marked Plff's. Ex. No. 2. Mr. Thompson offers in evidence check No. 349 drawn by Elizabeth Lund to E. L. Noble in sum of $167.00, which is admitted and ordered marked Plff's. Ex. No. 3. David W. Elkins and F. M. Buchanan are each duly sworn and testify for and on behalf of the plaintiff. Edgar L. Noble is duly sworn and testifies for the plaintiff. Mr. Thompson offers in evidence certificate of R. Winton Elliott, Assistant to the Commissioner, Federal Housing Administration, to the effect that John William Westenrider was not an employee of F. H. A., which is admitted and ordered marked Plff's Ex. No. 4. Elizabeth Lund is recalled to the witness stand for further direct-examination. The plaintiff rests. The jury is admonished by the Court and excused to ten o'clock A. M. tomorrow. Mr. Hacker now files a motion for a directed verdict and submits the same without argument. It Is Ordered that the motion be, and the same hereby is,

denied. [10] The defendant is granted an exception. Court adjourns until ten o'clock A. M. tomorrow. [11]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Wednesday, September 30, 1942

No. 10,556

[Title of Cause.]

The further trial of this case coming on regularly this day, the same counsel, defendant and jury being present. The official reporter is also present. Mr. Hacker waives opening statement. The defendant, John William Westenrider, is duly sworn and testifies in his own behalf. The defendant rests. At 10:35 o'clock A. M. the jury is admonished by the Court and excused for 15 minutes. Mr. Hacker now renews his motion for a directed verdict. The motion is denied and defendant granted an exception. The jury is recalled to the court room. Following arguments by counsel for the respective parties, the case is submitted. After hearing the instructions given by the Court, the jury, at 12:25 o'clock P. M., retires in charge of the Marshal to deliberate on the case. The Marshal is authorized to take the jury to luncheon. At 2:05 o'clock P. M. the jury returns into Court with the following verdict, to-wit: "In the District Court of the United States for the District of Nevada. The United States vs. Edgar L. Noble and John Wil-

liam Westenrider, alias John Levi, true name John William Westenrider. No. 10556. We, the jury in the above-entitled case, find the defendant, John William Westenrider, is guilty as charged in the first count of the indictment; and is guilty as charged in the second count. [12]

Dated this 30 day of September, 1942. Melvin J. Fodrin, Foreman.",—and so they all say. The jury is thanked by the Court and excused for the Term. Upon motion of Mr. Thompson, It Is Ordered that this defendant be, and he hereby is, remanded to the custody of the Marshal. It Is Further Ordered that the matter of imposition of sentence be, and the same hereby is, continued to October 1, 1942, at ten o'clock A. M. at Reno, Nevada, subject to the further order of the Court. * * * [13]

[Title of District Court and Cause.]

VERDICT OF JURY

We, the Jury in the above-entitled case, find the defendant, John William Westenrider, is guilty as charged in the first count of the indictment; and is guilty as charged in the second count.

Dated this 30 day of September, 1942.

MELVIN J. FODRIN
Foreman.

[Endorsed]: Filed Sept. 30, 1942. [14]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, Thursday, October 1, 1942

No. 10,556

[Title of Cause.]

The defendant John William Westenrider appears this day in the custody of the Marshal, this being the time heretofore fixed for passing sentence. W. L. Hacker, Esq., attorney for defendant, is also present. The defendant consenting thereto, It Is Ordered that the time for imposition of sentence be, and the same hereby is, continued to October 6, 1942, at ten o'clock A. M., at Reno, Nevada, subject to the further order of this Court. The defendant is remanded to the custody of the Marshal. * * * [15]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, Tuesday, October 6, 1942

No. 10,556

[Title of Cause.]

These defendants appear this day in the custody of the Marshal, this being the time heretofore fixed for passing sentence in this case. W. L. Hacker, Esq., attorney for defendant, John William Westenrider, is present in Court. State-

ment of case made by U. S. Attorney and probation officer. Thereupon the Court pronounces judgment as follows: "It Is by the Court Ordered and Adjudged that the defendant, John William Westenrider, having been found guilty of the offenses charged in the indictment herein, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eighteen (18) Months on Count 1; and One (1) Year and One (1) Day on Count 2—said sentences to run concurrently, one with the other. It Is Further Ordered that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein." The defendant is remanded to the custody of the Marshal. * * * [16]

District Court of the United States
in and for the District of Nevada

No. 10556—Criminal Indictment in Two Counts for Violation of U. S. C., Title 18, Secs. 76 and 88

UNITED STATES

vs.

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, true name JOHN WILLIAM WESTENRIDER, et al.

JUDGMENT AND COMMITMENT

On this 6th day of October, 1942, came the United States Attorney, and the defendant John William Westenrider, appearing in proper person, and by counsel, and,

The defendant having been convicted on a verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: did unlawfully, wilfully, knowingly and feloniously, with intent to defraud one Elizabeth E. Lund, falsely assume and pretend to be an officer or employee of the United States, to-wit: a Government investigator and inspector investigating alleged violations of the F. H. A. laws and regulations, and in such pretended character did obtain a check from said Elizabeth E. Lund, drawn to the Order of Edgar L. Noble in the sum of $167.00; Count 2: unlawful conspiracy to defraud said victim—said

crimes having been committed on or about the 14th day of June, 1942, at Carson City, Ormsby County, State and District of Nevada, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eighteen (18) Months on Count 1; and One (1) Year and One (1) Day on Count 2—said sentences to run concurrently, one with the other.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) FRANK H. NORCROSS
United States District Judge.

The Court recommends commitment to a Penitentiary.

A True Copy. Certified this 6th day of October, 1942.

(Signed) O. E. BENHAM
Clerk.
(By) M. R. GRUBIC
Deputy Clerk. [17]

In the District Court of the United States of America, in and for the District of Nevada

No. 10,556

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR L. NOBLE, and JOHN WILLIAM WESTENRIDER, alias JOHN LEVI,

Defendants.

NOTICE OF APPEAL

John William Westenrider, Reno, Nevada, Appellant.

William L. Hacker, Reno, Nevada, Attorney for Appellant.

Offense:

Count I. Falsely assuming and pretending to be an officer of the United States and defrauding one Elizabeth E. Lund.

Count II. Conspiring with one Edgar L. Noble to commit the offense above mentioned.

Date of Judgement: October 6th, 1942.

Defendant confined in the Washoe County Jail, Reno, Washoe County, Nevada.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgement above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of the sentence pending [18] appeal.

/s/ JOHN WILLIAM WESTENRIDER
Appellant.

Dated October 8th, 1942.

Grounds of appeal:

1. There was not sufficient evidence to submit to the jury as to any intent on the part of the defendant to commit the offense alleged in Count I of the Indictment, and/or as to any conspiracy on the part of the defendant to commit the offense above specified, and the Court should have dismissed the cause at the close of the Government's case or directed a verdict at the close of the entire case.

2. The Government failed to prove any criminal intent on the part of the defendant.

3. The evidence adduced at the trial is as consistent with innocence as with guilt and is insufficient to sustain a conviction of the offenses alleged in the indictment or any crime at all.

[Endorsed]: Filed Oct. 9, 1942. [19]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, October 13, 1942
No. 10556

[Title of Cause.]

Pursuant to Chapter 7 of Criminal Appeals Rules as promulgated by the Supreme Court of the United States, It Is Ordered that October 16, 1942, at eleven o'clock A. M., at Reno, Nevada, be fixed as the time and place for conference by counsel for the respective parties and the Court with respect to the preparation of record on appeal of defendant John William Westenrider herein. [20]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, October 16, 1942
No. 10556

[Title of Cause.]

Pursuant to the request of Wm. L. Hacker, Esq., attorney for defendant John William Westenrider herein, It Is Ordered that the time for conference with respect to preparation of record on appeal, now set for this day, be, and the same hereby is, continued over to October 17, 1942, at 10:30 o'clock A. M., at Reno, Nevada. [21]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, October 17, 1942
No. 10556

[Title of Cause.]

At this time appears Bruce R. Thompson, Esq., Assistant U. S. Attorney; W. L. Hacker, Esq., attorney for the defendant Westenrider; and the defendant John William Westenrider, this being the time heretofore fixed for conference with respect to preparation of record on appeal. Mr. Hacker presents to the Court a form of order fixing the amount of bond of defendant pending the appeal. Thereupon the following order is made and entered, to-wit: "Order. (See formal order releasing defendant on $4000.00 bond) * * *" Mr. Hacker now presents a bond in the sum of $4000.00 with National Automobile Insurance Company as surety thereon, which bond is approved by the Court and filed herein. It Is Ordered that the defendant be released from custody on said bond pending the determination of the appeal herein. Upon motion of Mr. Thompson, It Is Ordered that the Court Reporter make and file a certified transcript of testimony upon the trial of this case, the original to be filed with the Clerk and a certified copy thereof served upon counsel for the plaintiff and for defendant and appellant, and that the defendant and appellant pay the reporter for the cost of said transcripts. The Court now gives cer-

tain directions concerning the preparation of the record on appeal. It Is Ordered that the further hearing in this matter be, and the same hereby is, continued to October 27, 1942, at ten o'clock A. M., at Reno, Nevada. [22]

[Title of District Court and Cause.]

ORDER RELEASING DEFENDANT ON BOND PENDING APPEAL

John William Westenrider, having duly filed and served a notice of appeal electing not to enter upon the service of his sentence pending appeal from the judgment of conviction rendered herein and from the sentence imposed herein on the 6th day of October, 1942, it is

Ordered that the defendant, John William Westenrider, be set at liberty upon furnishing a bond in the sum enumerated as follows:

Four Thousand Dollars ($4000.00) during dependence of said appeal in the Ninth Circuit Court of Appeals and until the Mandate of the said Circuit Court shall be issued and filed on said appeal and an order entered thereon.

Dated this 17th day of October, 1942.

FRANK H. NORCROSS
United States District Judge.

[Endorsed]: Filed Oct. 17, 1942. [23]

United States of America,
District of Nevada—ss.

APPEAL BOND NO. 30124

Know All Men by These Presents,

That we John William Westenrider, as principal, and National Automobile Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, are held and firmly bound unto the United States of America, in the sum of Four Thousand Dollars ($4,000.00), to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourse*lfs,* our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the 17th day of October, in the year of our Lord, One Thousand Nine Hundred and Forty-two.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the District of Nevada in a suit depending in said Court, between United States of America vs. John William Westenrider a judgment was rendered against the said John William Westenrider and the said John William Westenrider having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United *States Court* of Ap-

peals in and for the Ninth Circuit to be holden at the City of San Francisco in the State of California and Northern District of California,

Now, Therefore, if the said John William Westenrider surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in [24] case the judgment be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may be remanded for a new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

Acknowledged before me and approved the day and year first above written.

FRANK H. NORCROSS
United States District Judge
for the District of Nevada.

[*Seal*] JOHN WILLIAM WESTENRIDER
Address
Nevada City, Nevada

NATIONAL AUTOMOBILE INSURANCE COMPANY
By HARRY D. ADAMS
Attorney-in-Fact

States of California,
City and County of San Francisco—ss.

On this 13th day of October, in the year 1942 before me, George Gillen, a Notary Public in and for said County and State, personally appeared Harry D. Adams known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal] GEORGE GILLEN
Notary Public in and for said
County and State.

My Commission Expires January 1, 1943. [25]

This Power of attorney is hereby made a part of and attached to Bond No. 30124, John William Westenrider.

(Certified Copy)

POWER OF ATTORNEY

National Automobile Insurance Company

Know All Men by These Presents:

That the National Automobile Insurance Company, a corporation organized and existing under the laws of the State of California, and having its principal office in the City of Los Angeles, California, does hereby constitute and appoint Harry D. Adams of the City of San Francisco, State of

California, its true and lawful Attorney-in-Fact, to execute, seal and deliver for *an* on its behalf as Surety, Any and All Bonds and Undertakings, Recognizances, Contracts of Indemnity and Other Writings of Obligatory in the Nature Thereof, Which Are or May Be Allowed, Required, or Permitted by Law, Statute, Rule, Regulation, Contract or Otherwise, and the execution of such instruments in pursuance of these presents shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the duly elected officers of the Company at its Principal Office.

In Testimony Whereof, the National Automobile Insurance Company has caused this instrument to be signed and its corporate seal to be affixed by its officers this 31st day of December, 1941.

[Seal] NATIONAL AUTOMOBILE
INSURANCE COMPANY
By JOHN Q. McCLURE,
President
By O. W. MOORE,
Secretary [26]

State of California,
County of Los Angeles—ss.

On this 31st day of December, 1941, before me Helengene Duffin a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared John Q.

McClure and O. W. Moore to say that they are respectively the President and Secretary of the National Automobile Insurance Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and said John Q. McClure and O. W. Moore acknowledge said instrument to be the voluntary act and deed of said corporation.

In Witness Whereof, I have hereto set my hand and affixed my official seal the day and year first above written.

[Seal] HELENGENE DUFFIN
Notary Public in and for said
County and State.

My Commission Expires December 2, 1945.

ENDORSED

The foregoing is a true and correct copy of Power-of-Attorney granted to Harry D. Adams on the 31st day of December, 1941, authorizing him to execute Surety and/or Fidelity Bonds on behalf

of the National Automobile Insurance Company and has not been revoked.

Signed this 13th day of October, 1942.

[Seal] NATIONAL AUTOMOBILE INSURANCE COMPANY

By O. W. MOORE

Secretary

[Endorsed]: Filed Oct. 17, 1942. [27]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, October 27, 1942

No. 10556

[Title of Cause.]

This being the time heretofore fixed for further hearing on settlement of record on appeal, and the same coming on regularly this day, Bruce R. Thompson, Esq., appearing for and on behalf of the plaintiff; and W. L. Hacker, Esq., for the defendant John William Westenrider, Mr. Hacker asks for an extension of time in which to file appellant's bill of exceptions and assignment of errors. It Is Ordered that all matters herein, including the settlement of the record on appeal be, and the same hereby are, continued to November 14, 1942 at ten o'clock A. M., at Reno, Nevada. [28]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, November 14, 1942
No. 10556

[Title of Cause.]

This being the time heretofore fixed for settlement of record on appeal herein, and the same coming on regularly this day, Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on behalf of plaintiff; and Messrs. W. L. Hacker and M. B. Moore for the defendant John William Westenrider. Upon motion of Mr. Hacker, It Is Ordered that M. B. Moore, Esq., be associated as counsel for the defendant for the purpose of this appeal. Mr. Hacker now files assignment of errors. Counsel for the respective parties make brief statements concerning the record on appeal. It Is Ordered this matter is continued to November 19, 1942, at ten o'clock A. M., at Reno, Nevada for further consideration on the matter of appeal. [29]

In the District Court of the United States
in and for the District of Nevada

Minutes of Court, Thursday, November 19, 1942
No. 10556

[Title of Cause.]

This being the time heretofore fixed for settling of record on appeal of defendant John William Westenrider and the same coming on regularly

this day, Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on behalf of the plaintiff; and W. L. Hacker, Esq., for the defendant. Upon motion of Mr. Hacker, It Is Ordered that the time for settlement of record on appeal be, and the same hereby is continued to November 20, 1942, at ten o'clock A. M., at Reno, Nevada. Upon motion of Mr. Hacker, It Is Ordered that the time for filing record on appeal in the U. S. Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including December 11, 1942. [30]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Friday, November 20, 1942

No. 10556

[Title of Cause.]

Upon motion of the U. S. Attorney, It Is Ordered that the time for settlement of record on appeal herein be, and the same hereby is, continued to November 23, 1942, at ten o'clock A. M., at Reno, Nevada. [31]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Monday, November 23, 1942

No. 10556

[Title of Cause.]

This being the time heretofore fixed for settlement of record on appeal and the same coming on regularly this day, Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on behalf of the plaintiff, and Messrs. Wm. L. Hacker and M. B. Moore appearing for the defendant John William Westenrider. Mr. Hacker presents proposed bill of exceptions and Mr. Moore makes statement concerning same. On stipulation of counsel for the respective parties, It Is Ordered that the time for hearing and settlement of proposed bill of exceptions and proposed amendments thereto be continued until December 4, 1942, at ten o'clock A. M. at Reno, Nevada. [32]

In the District Court of the United States in and for the District of Nevada

Minutes of Court, Friday, December 4, 1942

No. 10556

[Title of Cause.]

This being the time heretofore fixed for settlement of record on appeal of John William Westenrider, and the same coming on regularly this day,

Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on behalf of the plaintiff, and Wm. L. Hacker, Esq., for the defendant John William Westenrider. Counsel for the respective parties sign the stipulation attached to the bill of exceptions and thereupon the following order, at the end of Bill of Exceptions, is signed by the Court, to-wit: "Order This is to certify that the foregoing Bill of Exceptions rendered by the Defendant-Appellant is correct in substance, that with the exhibits, all of which are to be submitted to the Circuit Court of Appeals on the argument by appropriate stipulation and order, it contains all the evidence in this cause, and the said exhibits are hereby made a part of this Bill of Exceptions, and it is hereby settled, allowed, and made a part of the record in this cause."

Upon motion of Mr. Hacker, the further order is entered, to-wit: "Order. On the consent of the attorneys for the respective parties, it is hereby Ordered that the Clerk of this Court prepare and certify a Transcript of the Record in the above entitled case for the use of the Ninth Circuit Court of Appeals of the United States by including therein the following: 1. Indictment. 2. Notice of Appeal. [33] 3. Assignment of Errors. 4. Bill of Exceptions. 5. Motion for Directed Verdict. 6. Originals of Plaintiff's Exhibits 1, 2, 3, and 4. 7. The Verdict of the Jury. 8. The Judgement of the Court". [34]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now Comes the defendant, John William Westenrider, by his attorney, and says that in the proceeding herein and in the orders and judgments entered there are manifest errors, to-wit:

Assignment of Error No. I.

The Court erred in denying the Motion made on behalf of the defendant at the end of the Government's case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a conviction.

(See Transcript of Testimony, Page 54.) [35]

Assignment of Error No. II.

The Court erred in denying the motion made on behalf of the defendant at the end of the whole case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie

case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a conviction.

(See Transcript of Testimony, Pages 70, 71, and 72.)

Assignment of Error No. III.

The Court erred over objection and exception of defendant's counsel in permitting on the direct-examination of David W. Elkin, the following question:

"Q. What was he doing there, if you know?

Mr. Hacker: Just a moment. I object to that line of questioning, upon the grounds it is incompetent, irrelevant, and immaterial, has no connection whatsoever with the issues in this case, doesn't prove or tend to prove any issue in this case. The issue here is that this defendant represented himself to be a Government officer in June, 1942. Now what he was doing in Virginia City for a year prior to that, I fail to see where it is relevant in any respect whatever.

Mr. Thompson: I suggest, your Honor——

Mr. Hacker: Now in that connection, if I may call the Court's attention to this fact—I don't know [36] what the purpose of this examination is, whether to show he is a man of good character or a man of bad character, but if that is his pur-

pose, it is wholly irrelevant because his character is not in issue until he puts it in issue. The Government will not be permitted to go into this man's prior life other than to ask if he has ever been convicted of a felony, and I would at least ask that the United States Attorney be required to state the object of this examination, his purpose.

Mr. Thompson: Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a Government officer, was making a false representation, whether that was an assumed character and what he was doing just immediately prior to June 14, 1942 is very relevant on that issue.

The Court: I will permit the question, subject to conditions later. If it isn't connected, it may be stricken.

Mr. Hacker: I would like to make the further objection, if the Court please, upon the ground it is not the best evidence. If he wants to prove he is not a Government officer, the records of the government will prove that.

The Court: That objection will be overruled for the present.

Mr. Hacker: I desire an exception on the grounds stated in the objection.

The Court: Exception may be noted.

(See Transcript of Testimony, Pages 25 and 26.) [37]

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated November 14, 1942.

WM. L. HACKER,
Attorney for Defendant.
W. B. MOORE,
Assistant.

[Endorsed]: Filed Nov. 14, 1942. [38]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Trial

Be It Remembered, that the above entitled case came on regularly for trial before the Court and a jury at Carson City, Nevada, on Tuesday, the 29th day of September, 1942, at 10:00 o'clock A. M., Hon. Frank H. Norcross, Judge, presiding.

Appearances:

Bruce Thompson, Esq., Asst. U. S. District Attorney, Attorney for Plaintiff.

William L. Hacker, Esq., Attorney for Defendant John Westenrider.

The following proceedings were had:

Opening statement made by attorney for plaintiff.

The Court: Does the defendant desire to make any statement at this time?

Mr. Hacker: Not at this time, your Honor. We will reserve it until later.

The Court: You may proceed with the witnesses.

MRS. ELIZABETH E. LUND,

a witness on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

Direct Examination [40]

My name is Elizabeth E. Lund. I live at 902 S. Virginia Street, Reno, Nevada. I own an apartment house at 204 S. Division and a six room dwelling at 202 S. Division, Carson City, Nevada. I own an apartment house at 204 S. Division St., Carson City, and on June 14th of this year I was residing there. I know John William Westenrider. I did not know him at that time. He is in the Court room right over there with the gray coat on. I saw him in Carson City on June 14th of this year at 2:00 o'clock Sunday morning. I was asleep. My doorbell rang and I asked who it was. Westenrider said it was two men traveling through and they wanted a room for the night. I took him upstairs, showed Mr. Westenrider three apartments and told him I had some cabins in the rear. We went downstairs and walked on the sidewalk around to the cabins. I looked over to the car, the automobile they were driving, it was parked right in front of the apartment house at 204 S. Division Street. I looked over,

(Testimony of Elizabeth E. Lund.)

saw Mr. Noble and said Mr. Noble is that you? He said yes, and Mr. Noble said take these handcuffs off me. They are hurting me. Mr. Westenrider didn't pay any attention to him, and Mr. Noble said again, take these handcuffs off me, they are hurting me. I said to Mr. Westenrider, what has he done that he has handcuffs on, and he said I just picked him up in Virginia City, he was drunk. I said is he drunk now, and he answered no, just scared to death. Mr. Westenrider, said he, Westenrider, was a government investigator and was investigating these loans where the public had been overcharged for work that was done and he said this work on your house shouldn't have been over $500.00, any contractor would have done that work for $500.00. I said why don't you see Mr. Hesse? He said I tried to get him before I got Mr. Noble but he skipped the country. Mr. [41] Hesse was partner with Mr. Noble in the contract work, putting imitation brick on the outside of the building, reframing windows and putting in window glasses which were broken. Mr. Westenrider said what did you and Mr. Hesse and Mr. Noble do with that $250.00, you got above the loan? I couldn't remember any $250.00. I knew I hadn't received any $250.00, I didn't know what he meant by that. I said, "Well, I don't know of any harm that has been done." Well, he said, "Don't you know that is stealing from the government? Your ignorance won't save you. Do you want to straighten this

(Testimony of Elizabeth E. Lund.)

out or stand trial with Mr. Noble? It is too bad for an old gray haired lady like you to have to stand trial. You had better go back to bed now and I will see you tomorrow at 12:00 o'clock." I had never seen Mr. Westenrider before, I knew Mr. Noble for some time. He done three contracts for me in Reno, he and Mr. Hesse. I recognized Mr. Noble, he was sitting in the car. At that time I also told Mr. Westenrider the money I had obtained had been used for improvements, work around there, painting and so forth. The contract work on my house done by Mr. Noble and Mr. Hesse started October 31st, they took several weeks to finish. A contractor who lives in Carson City done part of the work, the painting. He made a contract with me to do it. Mr. Hesse and Mr. Noble put the brick on the house, they hired it done. They started about the 30th of October, 1941. (At this point Mr. Thompson had an instrument marked for identification, as plaintiff's Exhibit No. 1. Witness' attention was called to an item of $833.00.) This paper (plaintiff's Exhibit No. 1 for identification) is a copy of the contract they were going to use. They cancelled it afterwards. That is my signature at the bottom of the contract. That is the first agreement for repair of house at 204 S. Division Street in Carson [42] City, but they changed it.

I saw Mr. Noble and Mr. Westenrider again about noon, Sunday, June 14th. They came to my home at 204 S. Division Street, Carson City. When

(Testimony of Elizabeth E. Lund.)
they got to the house Mr. Noble said I'd like to speak to you privately. I said come over to the corner of the house. He said no, I don't want Mr. Westenrider to hear what I have to say to you. Well, I said, go upstairs to the apartment. We went upstairs, Mr. Westenrider watched us. I went upstairs with Mr. Noble to the apartment. We had a conversation, Mr. Noble said I am awfully sorry, I tried to get you out of this trouble, I even tried to sell the keg of nails. He said I even tried to sell my clothes to get some money. He said you are a highly respected woman, I hate to see you get in this trouble. We then went downstairs, Mr. Westenrider was in the front room. Westenrider showed me these papers out of his brief case and asked if I hadn't read this notice on there where it said "Warning." He also had this contract. He said he was leaving town on the 15th. (The contract, plaintiff's Exhibit No. 1 for identification, was offered in evidence without objection and received in evidence as plaintiff's Exhibit No. 1.)

PLAINTIFF'S EXHIBIT No. 1

CONTRACT AND/OR ORDER

Reno, Nevada—Date Oct. 30 1941.
Order No.....

To Nevada Roofing & Remodeling Co., Licensed and Insured Bldg. Contractors, 307 Pine St., Reno, Nev.

(Testimony of Elizabeth E. Lund.)

This is your authority to perform the following roofing or remodeling: (Job Address) 204 So. Division.

For (Print Name)—Elizabeth Lund. City—Carson City. State—Nevada.

Type of shingles of roofing to be applied—Blank. Color—Blank.

Apply to hips and ridges—Blank. Color—Apply to Valleys—Blank. (of single, double thickness, Color—Blank.

Details of ~~Roofing~~ or Remodeling—Cover house complete with Briktex Color Red insulation also replace all window & door frames & sills also replace broken windows, put new sill under house also level up same for the sum of one thousand dollars ($1000.00) we will return one hundred & sixty seven dollars ($167.00) as soon as job is completed so do no painting or electric work.

Recorded owner of property—Blank.
Address—Blank.
Terms: Full contract price—$833.00
Cash Payment—$.....
Balance due on note $.....
To be paid—F. H. A. 36 months.
Payable $31.94 per month, beginning (Date) Jan. 2nd 1942.

(Testimony of Elizabeth E. Lund.)

This company agrees to do Only what is written on the face of this order; verbal promises not to modify this agreement.

This agreement is subject to approval of Sales Manager of this company and property owner's credit.

Above read, understood and agreed to, as written.

Not responsible for any consequential damage.

Signed: ELIZABETH E. LUND

(Owner or Agent)

Address.....

(Mailing Address)

Salesman—(Illegible).

[Endorsed]: Filed Sept. 29, 1942.

Mr. Westenrider had this contract in his brief case on Sunday noon, June 14th. He read it to me. He said this $167.00, had to be paid that day as he was leaving town the next day and he wouldn't be around there. He read the warning notice.

(The notice warning was marked for identification as plaintiff's Exhibit No. 2.) (This notice was offered in evidence and admitted without objection.)

This warning was read to me at noon Sunday, June 14th, the whole thing was read to me by Mr. Westenrider.

(Testimony of Elizabeth E. Lund.)

(Plaintiff's Exhibit No. 2 [43] received in evidence without objection and Mr. Thompson read Exhibit 2 to the jury. This Exhibit is certified up with the record.)

PLAINTIFF'S EXHIBIT No. 2

WARNING

"Sec. 512 (a) National Housing Act, as amended. —Whoever, for the purpose of obtaining any loan or advance of credit . . . with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance . . . makes, passes, utters or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both."

[Endorsed]: Filed Sept. 29, 1942.

Mr. Westenrider demanded the sum of $167.00, and I told him I didn't have that much money in

(Testimony of Elizabeth E. Lund.)
the bank at that time, and the only way I could do would be to give him a check dated June 17th when I would have the money which I did. Then I asked him what his name was and he told me John Levi. At that time I believed Mr. Westenrider to be a government investigator. I started to write the check out to him and Westenrider said make this check to Mr. Noble, it will look a little better, it will look as though he done some contract work for you. I made the check out to Mr. Noble (A check on the First National Bank of Reno drawn to the order of E. G. Noble in the sum of $167.00 and signed by Elizabeth E. Lund was shown to the witness) Answer, Yes, that is the check I gave to Mr. Westenrider.

(Check offered in evidence and admitted without objection as plaintiff's Exhibit No. 3.)

PLAINTIFF'S EXHIBIT No. 3

94-2 First and Virginia Branch 94-2 No. 349
First National Bank of Nevada
Reno, Nevada, June 17, 1942
Pay to the Order of E. G. Noble.....$167.00
One Hundred Sixty Seven and no/100 Dollars
ELIZABETH LUND
902 S Va St.

(Testimony of Elizabeth E. Lund.)

(Signatures on Back)

E. L. NOBLE
LINCOLN MARKET
302 East 4th St.
Reno, Nevada.
F M B

Any Prior Endorsements Guaranteed
Jun 15 '42 0004
First National Bank of Nevada
First & Virginia Branch
Reno, Nevada 94-2

[Endorsed]: Filed Sept. 29, 1942.

I think I gave the check to Mr. Noble and he handed it to Mr. Westenrider. Mr. Noble then said to Mr. Westenrider, I suppose this will set me free now. Mr. Westenrider said no, there are two more just such cases to straighten out. They walked away and that's the last I seen of them for a few more days. Mr. E. P. Hesse represents the Nevada Roofing Company. Mr. Noble was associated with him in October, 1941, when Mr. Hesse took the contract to do the remodeling work on my property.

Cross Examination

I have known Mr. Noble and Mr. Hesse for some time. They assisted me in getting the government loan for the remodeling work on my property in Carson City. Were you in arrears on that contract

(Testimony of Elizabeth E. Lund.)

to the F. H. A.? You mean that I owed some money? Yes. [44] I don't know what you mean by arrears, Mr. Noble and Mr. Westenrider read the contract (plaintiff's Exhibit No. 1) to me and said that I owed $250.00, but that wasn't the amount, they had the amount of $167.00 on this paper. Mr. Westenrider told me he was a government agent or employee. I believed him. I gave him a check for $167.00, because they insisted on me giving that to them. I didn't owe it to them. I did not think I owed it to the government, I gave it because he was threatening to bring it into Court. He insisted on having it, on me giving it to them. I pay the government $33.00 every month. I didn't say I owed $167.00, this man said I owed it. I owed the government the whole contract which was for $1033.00. Mr. Hesse and Mr. Noble allowed me this contract work which he said the union wouldn't allow them to do so they returned the $167.00, to do this extra work. I was not in arrears $167.00, when I gave Noble the check. They said that I was in bad with the F. H. A., that I had received some money there that should have gone in on the contract and if I didn't pay them this $167.00, they would report it. I paid it because they said I should do so. Later, I found out from Mr. Hesse that they weren't government men. I stopped payment on the check. I'm paying off every month the $33.00 written in the contract on the F. H. A. loan. Part of the money from the F. H. A. loan did not go into the building, only Mr.

(Testimony of Elizabeth E. Lund.)
Hesse told me to have it done, screens for the windows were purchased with part of the money returned to me. I didn't pay this $167.00 to prevent them from reporting it back, they just told me I had to do it. They didn't say they had to report it. He said he was a government investigator. No, I wasn't trying to bribe them, or the investigator, I thought it was right for me to pay it back if he said I had done the wrong thing. [45]

Since I gave the check to Noble I have discussed the matter with the F. B. I. man but he didn't authorize me to pay it back, he didn't authorize me to do anything about it. The contract Mr. Hesse made up he said was all right. Mr. Hesse said they couldn't do this work and returned this money for me to do the work. I was not told I would receive immunity if I paid the $167.00. It wasn't suggested to me. Mr. Noble and I did not conspire to bribe this defendant. I gave that $167.00 to Mr. Noble. I did not frame up for Mr. Noble to give him $167.00, to square myself with this government officer. Everything about the loan was already down in black and white at the bank. I gave the $167.00, because he asked me to, he said he wanted it. He did defraud me because he didn't want it for the government at all, he wanted it for himself. I didn't think I owed the government at all because the full amount was put on the contract. He said I had to pay it, he insisted on it.

When Mr. Noble and I went upstairs he said he

(Testimony of Elizabeth E. Lund.)

was sorry he got me into trouble. He said he tried to straighten this thing up, but he couldn't raise the money. Mr. Hesse wrote the contract. I think Mr. Noble knew all about it. Mr. Noble thought this was a mistake. I later talked with Mr. Hesse and he said it wasn't a mistake, they were union men and couldn't do this work so they got extra money for me to do it. Mr. Noble didn't get any money. Mr. Hesse returned this money for me to do the painting. When Mr. Noble and I talked together up in the room I don't know what Mr. Noble had reference to about getting into trouble, there was nothing said up in the room other than I have told you. I then went down stairs and gave him the check. Mr. Westenrider was the one that wanted the check. I made the check to Mr. Noble because [46] this man said to make it out. Mr. Westenrider said to make it out to Mr. Noble, he said it would look as though he done some contract work for me, and it would look a little better. I didn't give it to Mr. Westenrider so he wouldn't report me to the F. H. A. I gave it because he said I owed it to the government and because he told me to. He didn't tell me he would have me prosecuted if I didn't. Well, I shouldn't have paid anybody only he told me I had to; that was the law. He just told me to, he did not threaten me. I didn't think he would injure me, I was just doing what he told me. He told me to give it to him.

(Testimony of Elizabeth E. Lund.)

Redirect Examination

When I talked with Mr. Westenrider that day he showed me this agreement, he read that warning to me. He said I was stealing from the government. I paid that $167.00 to Mr. Westenrider because he said it was stealing from the government. I supposed he was a government agent, but I didn't know. He said he was a government investigator, that he investigated loans when the public had been overcharged for the work they had done.

DAVID W. ELKINS,

a witness in behalf of the plaintiff being first duly sworn, testified in substance as follows:

Direct Examination

My name is David W. Elkins. I reside in Virginia City, Storey County, Nevada. I am Sheriff of Storey County. I've held that position four and a half years. I know John William Westenrider. He is in the Court Room. I first met him in January, 1941, in the office at Virginia City. I saw him from January, 1941, to June, 1942, at least once or twice a week. Question: What was he doing there, if you know? [47]

Mr. Hacker: Just a moment. I object to that line of questioning, upon the ground that it is incompetent, irrelevant, and immaterial, has no connection whatever with the issues in this case, doesn't

(Testimony of David W. Elkins.)

prove or tend to prove any issue in this case. The issue here is that this defendant represented himself to be a government officer in June, 1942. Now what he was doing in Virginia City for a year prior to that, I fail to see where it is relevant in any respect whatever.

Mr. Thompson: I suggest, your Honor——

Mr. Hacker: Now, in that connection, if I may call the Court's attention to this fact, I don't know what the purpose of this examination is, whether to show he is a man of good character or a man of bad character, but if that is his purpose, it is wholly irrelevant because his character is not in issue until he puts it in issue. The government will not be permitted to go into this man's prior life other than to ask if he has ever been convicted of a felony, and I would at least ask that the United States Attorney be required to state the object of this examination, his purpose.

Mr. Thompson: Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a government officer, was making a false representation, whether that was an assumed character and what he was doing just immediately prior to June 14, 1942, is very relevant on that issue.

The Court: I will permit the question, subject to conditions later. If it isn't connected, it may be stricken.

(Testimony of David W. Elkins.)

Mr. Hacker: I would like to make the further objection, if the Court please, upon the ground it is not the best evidence. [48] If he wants to prove he is not a government officer, the records of the government will prove that.

The Court: That objection will be overruled for the present.

Mr. Hacker: I desire an exception on the grounds stated in the objection.

The Court: Exception may be noted.

Question: Will you state what John William Westenrider was doing in Virginia City prior to June 14, 1942?

Answer: I think in the summer of 1931, he was supposed to have an antique shop, the "Territorial Enterprize," that was the summer of 1941. I don't imagine he ever done any business in there, I don't remember him doing anything. Prior to June 14, 1942, he had no job in Virginia City that I know of, I saw him in Virginia City prior to June 14, 1942, very frequently.

Cross Examination

He had been employed at the mines at Virginia City for a couple of months. He is working at the New York mine. He has been employed there for the past two months. I have known him in Virginia City since January, 1941. He never represented to me that he was an officer of the United States Government. I never heard of him representing himself as an officer or an employee of the government.

F. M. BUCHANAN,

a witness on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

Direct Examination

My name is F. M. Buchanan. I reside in Reno. I am in the grocery business. I was living there on June 14, 1942. My [49] business is known as the Lincoln Market. I know E. L. Noble, have known him for about three years. (Exhibit No. 3, a check, was shown the witness.) I have seen that before on Sunday noon, the 14th. I guess it was on a Sunday. Edgar L. Noble brought some fellow with him to my house. He had called me on the phone before he came. He told me he had some money and he wanted to pay me some and I better get it while he had it. He insisted I take care of it that day, he brought a fellow with him. I don't think I would recognize the man again. I cashed the check (Exhibit 3) for Mr. Noble. The way I cashed it was Noble said he wanted the man with him to have $70.00, so I gave him, the man who was with him, $70.00, in currency, and Noble wanted to apply $50.00 on what he owed me. I held out $15.00, Noble owed Pay-Less and gave him $14.00, in cash. That left $18.00, and I told him to stop by the store the following day and get it. I gave the man who was with him $70.00.

EDGAR L. NOBLE,

a witness on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

Direct Examination

My name is Edgar L. Noble, I am one of the defendants in this action. I have pleaded guilty to the second count of the indictment. I am fifty-two years old. My business is construction. I was engaged in that business during the year of 1941. I was associated with Mr. E. P. Hesse. I did some work for Mrs. Elizabeth Lund in 1941 in Reno, also in Carson City at No. 204 S. Division Street. I was working for Mr. Hesse. (Exhibit No. 1 was shown the witness.) Exhibit No. 1, just shown me is the customary installation for Mrs. Lund, it is the copy of [50] the contract with Mrs. Lund and Mr. Hesse. It was the contract for the remodeling of her house at 204 S. Division Street. I know John William Westenrider. I see him in the Court Room, the gentlemen sitting over there (indicating defendant Westenrider). I saw him two or three times prior to the time I met him this spring. I met him the 10th of June, 1942, at Reno. We had a short conversation in regard to some work at Virginia City. He had never been associated with me in any work. If we got these jobs at Virginia City we were talking about we were going to do the work, it was roofing jobs, two roof jobs. I saw him again on Thursday, June 11th, I saw him again on Friday, June 12th of this year in Reno.

(Testimony of Edgar L. Noble.)

We went to Virginia City in Mr. Westenrider's car. We were going to see about this work down there. We had a talk on Saturday about an F. H. A. job. On Friday he went to see the priest for me and came back and we were together most of the time, we started down to Carson City to get some tools and some money I had coming. We had a conversation regarding F. H. A. jobs and how to handle them, on Saturday in Virginia City. The conversation was to the effect that we could get up to $500.00 for remodeling a home. We couldn't get any more money than went into the jobs. We couldn't try to get more for the prospect. We could get up to $500.00 for eighteen months, but couldn't get any more money than the job was. I mentioned Mrs. Lund, I told him I got the job for her and I got more money for the job. I said I got the job for Mrs. Lund and I got her more money than the job came to and we weren't allowed to do that. I told this to Westenrider. We then started to Gardnerville to get my tools and some money coming to me. We then went back to Reno, this was on a Saturday and I went to pick up some nails and tools but somebody had got them. [51] Mr. Westenrider and I then went to Virginia City that evening. I ran out of money and I said lets go down to Carson City and get some money from Pardini. We drove from Virginia City to Carson City around nine or ten o'clock at night, Saturday the 13th of June. On

(Testimony of Edgar L. Noble.)

the way down we had a conversation about this Lund deal. Mr. Westenrider said we would go down there and make her give this money back. I said okay. I said how are you going to handle it? He said he would be a special investigator. I said he would get into trouble, but he said he could handle it. I agreed to do it with him. After we got to Carson City we couldn't get a room at Pardini's so we went to Mrs. Lund's and he went inside and said there was no room. She asked if I was in trouble and I said yes. Mrs. Lund and Mr. Westenrider then went behind the car and talked. They were talking quite a while. After Mr. Westenrider came back from talking to Mrs. Lund we went up town and got a room. Westenrider said he would see Mrs. Lund tomorrow. We went back the next morning around ten o'clock. Westenrider and I saw Mrs. Lund at her place at 409 N. Division Street in Carson City. Mr. Westenrider talked with her and Mrs. Lund and I went upstairs and talked. I did not hear what Westenrider said to her. She asked me what I was going to do and I said I didn't know. I didn't have any money. It looked like plenty of trouble, that I didn't have anything to sell. I sat down on the chesterfield in the corner of the room. Then Mr. Westenrider came in and talked to Mrs. Lund. I did not hear what he said. (Plaintiff's Exhibit No. 2 was shown the witness.) He said I don't know whether I ever saw that before or not, but they are all like it. I saw one like it on June

(Testimony of Edgar L. Noble.)

14th when Westenrider and I were with Mrs. Lund. Mr. Westenrider had it in my portfolio. Mr. Westenrider took it out when he was talking [52] with Mrs. Lund. I saw him do that. Mr. Westenrider also had Exhibit No. 1. It was in the portfolio. After Mr. Westenrider talked to Mrs. Lund she made out a check for $167.00. I had no conversation with her about it. She made the check to me. Exhibit No. 3 is the check Mrs. Lund made out at that time. After that we went to Reno. Mr. Westenrider told me he had the check made out to me because I knew where I could get it cashed. We went to Reno and I called up Mr. Buchanan at his home and asked him if he could cash the check. He said to come out and he would see what he could do. We took the check out to Mr. Buchanan, he cashed the check but didn't have enough to cash it all. He gave Mr. Westenrider $70.00 and I got $14.00. I got $14.00, out of the check. Westenrider got $70.00.

Cross Examination

The check I cashed at Buchanans, I told him to give Westenrider $70.00, I told him I owed Mr. Westenrider $70.00. That was what Westenrider was supposed to have out of that check I just told Buchanan I owed Westenrider $70.00. We drank some of it up, might have gambled a little.

I went up in the room the second day and talked with Mrs. Lund. There was not much to it. I said it looks like I am in a jam because I got her more

(Testimony of Edgar L. Noble.)

money on that loan than the government would allow her. I got her $167.00, she knew that the reason she gave the check was to square this amount. I don't know if she knew she owed that to the government or not. I told her she should pay it back to the government. She gave it for that purpose. I had assisted her in obtaining the loan. I wrote out the application for her. I called her attention to it and told her I didn't have any money or means of clearing it up. She didn't have to do [53] it, she did it because I called her attention to it. Mr. Westenrider and I had an understanding prior to the time we got the money. He said that he would represent himself to be a special investigator. We went to Gardnerville to see about getting some money. I had been drinking, some people might call it excessively. When I pleaded guilty I did not ask for immunity, like everybody else I hoped for the best. I have not yet been sentenced. I pleaded guilty three and a half months ago before the commissioner.

Redirect Examination

I am not asking Mr. Westenrider is to blame any more than I am in getting this money because I knew better than to go into a deal of that kind. I do not know what Mrs. Lund did with the $167.00.

Recross Examination

I never represented to Mrs. Lund that there was $167.00, due the government or anything was due the government. I just told her she had $167.00,

(Testimony of Edgar L. Noble.)

she wasn't allowed to get. Mrs. Lund and I did not have any understanding about the $167.00, I just said to her that I couldn't raise the money to pay this $167.00, back to the F. H. A. Out of the $167.00, I paid $50.00, on the grocery bill, and Mr. Westenrider got $70.00. We didn't give any to the government. We spent it for our own use.

By Mr. Thompson: If the Court please, I offer in evidence certificate of R. Winton Elliott, Assistant to the Commissioner of the Federal Housing Administration to the effect that John William Westenrider has never been an employee of the Federal Housing Administration.

Mr. Hacker: No objection. As a matter of fact, we will stipulate that he has never been in any wise connected with the [54] F. H. A.

PLAINTIFF'S EXHIBIT No. 4

Federal Housing Administration
Washington, D. C.
September 24, 1942.

R. Winton Elliot
Assistant to the Commissioner

To Whom It May Concern:

The undersigned, Assistant to the Commissioner of the Federal Housing Administration, in charge of personnel, does hereby certify that the records of the Federal Housing Administration have been examined and up to the date of this affidavit, according to the search of such records, no person

(Testimony of Edgar L. Noble.)

has been employed by the Federal Housing Administration either on an annual basis or as a fee employee, or as a per diem employee under the name of John William Westenrider. The undersigned further certifies that no application for employment with the Federal Housing Administration in the name of John William Westenrider is now on file in the Washington office of the Federal Housing Administration.

R. WINTON ELLIOTT,
Assistant to the Commissioner.

I, Lorraine F. Argent, Notary Public in and for the District of Columbia, do hereby certify that the above affidavit was signed in my presence by R. Winton Elliott, Assistant to the Commissioner, in charge of Personnel, Federal Housing Administration, and that such signature is the signature of R. Winton Elliott, Assistant to the Commissioner, in charge of Personnel, Federal Housing Administration.

Subscribed and sworn before me, this twenty-fourth day of September, nineteen hundred and forty-two.

[Seal] LORRAINE F. ARGENT.

[Endorsed]: Filed Sept. 29, 1942.

MRS. LUND,

recalled, testified in substance as follows:

Direct Examination

I painted the outside of the house and some of the inside and done some framing, different things with the $167.00, that Mr. Hesse gave me out of the money borrowed on the F. H. A. loan. I spent $189.00, on the property that I have the record of. Mr. Hesse bought screens which made a total above $833.00, of $1033.00, the loan. The money was spent on the improvement of my property at 204 S. Division Street, Carson City.

Cross Examination

The amount was $167.00, Mr. Hesse didn't use that at all, Mr. Hesse told me he never used this contract at all, this one you have here. I did not give the $167.00, to Mr. Noble for his own use. Mr. Westenrider told me to make it out to him. (A check for $167.00, was shown the witness.) They claim there was that much over the contract. He was supposed to be a government agent and I just supposed they wanted me to pay this back that Mr. Hesse returned to me. That wasn't the correct amount. I don't know the correct amount off hand. I did not give it to Mr. Westenrider to use for his own benefit. They said I got more money than the amount I should have got from the government the amount of $167.00, and they were supposed to return it to the Federal Housing Administration.

At this point the plaintiff rested its case. A mo-

tion for a directed verdict was made at the close of the government's case. The jury was excused, and the Court denied the motion for a directed verdict. [55]

The testimony on the part of the defendant was by the defendant himself and consisted of a denial of all the testimony of Mr. Noble and of receiving any of the money out of the check but he did admit that he was at Mrs. Lund's home with Mr. Noble on Saturday night at two o'clock and on Sunday forenoon about twelve o'clock on June 14, 1942. The defendant testified that when he and Noble reached Mrs. Lund's house about noon on Sunday, June 14, 1942, Mrs. Lund immediately began to berate Noble for not paying her some rent and also for not putting some sills under her house, which he was supposed to do under his contract with her; that Noble and Mrs. Lund then went upstairs and shortly thereafter Noble came back down with Mrs. Lund's check to his order for $167.00. [56]

[Title of District Court and Cause.]

STIPULATION AS TO BILL OF EXCEPTIONS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the foregoing Bill of Exceptions is correct in substance, that with the exhibits, all of which are

to be submitted to the Circuit Court of Appeals on the argument by appropriate stipulation and order, it contains all the evidence in this cause, and that it may be duly signed, settled and allowed by the Honorable Frank H. Norcross, United States District Judge, who presided at the trial of this cause.

Dated: December 4, 1942.

BRUCE R. THOMPSON,
Ass't. United States Attorney.
WM. L. HACKER,
Attorney for Defendant-Appellant. [57]

ORDER

This is to certify that the foregoing Bill of Exceptions rendered by the Defendant-Appellant is correct in substance, that with the exhibits, all of which are to be submitted to the Circuit Court of Appeals on the argument by appropriate stipulation and order, it contains all the evidence in this cause, and the said exhibits are hereby made part of this Bill of Exceptions, and it is hereby settled, allowed, and made a part of the record in this cause.

FRANK H. NORCROSS,
United States District Judge.

Dated: December 4th, 1942. [58]

[Endorsed]: Filed Dec. 4th, 1942.

[Title of District Court and Cause.]

ORDER RE TRANSCRIPT OF RECORD

On the consent of the attorneys for the respective parties, it is hereby Ordered that the Clerk of this Court prepare and certify a Transcript of the Record in the above entitled case for the use of the Ninth Circuit Court of Appeals of the United States by including therein the following:

1. Indictment
2. Notice of Appeal
3. Assignment of Errors
4. Bill of Exceptions
5. Motion for Directed Verdict
6. Originals of Plaintiff's Exhibits 1, 2, 3, and 4.
7. The Verdict of the Jury
8. The Judgment of the Court

Dated this 4th day of December, 1942.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed Dec. 4, 1942. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. Edgar L. Noble and John William Westenrider, alias John Levi, true name John William Westenrider, Defendants, said case being No. 10,556 on the criminal docket of said Court.

I further certify that the attached transcript, consisting of 61 typewritten pages numbered from 1 to 61, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the Order of Court, dated December 4, 1942, and filed and entered in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid. [60]

I further certify that pursuant to Order of

Court, filed and entered December 4, 1942 herein there is accompanying this Transcript of Record on Appeal the following original exhibits, to-wit:

Plaintiff's Exhibits:

No. 1, Copy of "Contract and/or Order" signed by Elizabeth E. Lund;

No. 2, Printed form "F. H. A. Title I Loan, Credit Statement—Application" with printed warning at the bottom of the back side thereof;

No. 3, Check No. 349, dated June 17, 1942, signed by Elizabeth Lund, payable to E. L. Noble, in the amount of $167.00;

No. 4, Certificate of R. Winton Elliott, Assistant to the Commissioner, Federal Housing Administration, dated September 24, 1942.

And I further certify that the cost of preparing and certifying to said record, amounting to $15.00, has been paid to me by Wm. L. Hacker, Esq., one of the attorneys for the appellant herein.

Witness my hand and the seal of said United States District Court this 9th day of December, 1942.

[Seal] O. E. BENHAM
Clerk, U. S. District Court.

[61]

[Endorsed]: No. 10290. United States Circuit Court of Appeals for the Ninth Circuit. John William Westenrider, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed December 11, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10290

United States
Circuit Court of Appeals
For the Ninth District.

JOHN WILLIAM WESTENRIDER,
Appellant,

-vs-

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Upon Appeal from the United States District Court for the District of Nevada

Attorneys for Plaintiff: William L. Hacker
6 West Commercial Row
Reno, Nevada.

M. B. Moore,
103 Mill Street,
Reno, Nevada.

A. CARLISLE & CO. OF NEV., 131 N. VIRGINIA ST., RENO, NEV.

No. 10290

United States
Circuit Court of Appeals
For the Ninth District.

JOHN WILLIAM WESTENRIDER,
Appellant,

-vs-

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Upon Appeal from the United States District Court for the District of Nevada

Attorneys for Plaintiff: William L. Hacker
6 West Commercial Row
Reno, Nevada.

M. B. Moore,
103 Mill Street,
Reno, Nevada.

INDEX

No. 10290

United States
Circuit Court of Appeals
For the Ninth District

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

JURISDICTION

The defendant and one, Edgar L. Noble, were jointly indicted at the May, 1942 term of the United States District Court in and for the District of Nevada.

The jurisdiction of the trial court, United States District Court for the District of Nevada, was conferred by Sections 76 and 88 T. 18 U.S.C.A.

The jurisdiction of the above entitled court, to wit: The Circuit Court of Appeals in and for the Ninth District herein was conferred by Title 28, U.S.C., Section 225, Judicial Code, Section 128.

CONCISE STATEMENT OF CASE, QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED.

This is an action in which EDGAR L. NOBLE and JOHN WILLIAM WESTENRIDER, alias John Levi, were indicted in the Federal Court for the District of Nevada in the May term of said District Court for 1942 for violation of Section 76 and 88, Title 18, U.S.C.A. The defendant, Noble, had plead guilty to the charges in said indictment. Westenrider plead not guilty and was brought to trial before a jury in said Court on or about September 29, 1942, upon the plea of not guilty. Upon the final termination of the trial, the defendant was found guilty by the jury; the verdict being returned on September 30, 1942, being found guilty upon the first and second counts of said indictment. The time for sentence was fixed for October 6, 1942, at which time the Court entered its judgment and sentence; sentencing the defendant on the first count, to eighteen months, and on the second count, one year and one day; the sentences to run concurrently.

(See Record on Appeal, Pages 12 and 13, from which sentence this appeal is taken.)

Thereafter, a notice of Appeal to the Circuit Court of Appeals was filed and served.

(See Record on Appeal, Page 16.)

The grounds of appeal, as set out in said notice of appeal, were as follows:—

1. There was not sufficient evidence to submit to the jury as to any intent on the part of the defendant to commit the offense alleged in Count 1 of the Indictment, and/or as to any conspiracy on the part of the defendant to commit the offense above specified, and the Court should have dismissed the cause at the close of the Government's case or directed a verdict of not guilty at the close of the entire case.

2. The Government failed to prove any criminal intent on the part of the defendant.

3. The evidence adduced at the trial is as consistent with innocence as with guilt and is insufficient to sustain a conviction of the offenses alleged in the indictment or any crime at all.

Thereafter, upon filing a bond in the sum of $4,000.00 the defendant was released from custody and is now awaiting action of the Circuit Court of Appeals and is out under bond.

(See Record on Appeal, Page 20.)

Thereafter, the Bill of Exceptions and Settlement of Record of Appeal was agreed upon and settled by the court and a stipulation signed, which is attached to the Bill of Exceptions.

(See Record on Appeal, Page 29.)

ASSIGNMENT OF ERRORS

The errors relied upon by appellant are three in number, commencing on page 31 of the Record on Appeal.

Assignment No. 1 is as follows:

The Court erred in denying the Motion made on behalf of the defendant at the end of the Government's case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a conviction.

Assignment No. 2 is as follows:

The court erred in denying the motion made on behalf of the defendant at the end of the whole case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a convicton.

Assignment No. 3 is as follows:

The Court erred over objection and exception of defendant's

counsel in permitting on the direct-examination of David W. Elkin, the following question:

"Q. What was he doing there, if you know?

Mr. Hacker: Just a moment. I object to that line of questioning, upon the grounds it is incompetent, irrelevant, and immaterial, has no connection whatsoever with the issues in this case. The issue here is that this defendant represented himself to be a Government officer in June, 1942. Now what was he doing in Virginia City for a year prior to that, I fail to see where it is relevant in any respect whatever.

Mr. Thompson: I suggest, Your Honor—

Mr. Hacker: Now in that connection, if I may call the Court's attention to this fact—I don't know what the purpose of this examination is, whether to show he is a man of good character or a man of bad character, but if that is his purpose, it is wholly irrelevant because his character is not in issue until he puts it in issue. The Government will not be permitted to go into this man's prior life other than to ask if he has ever been convicted of a felony, and I would at least ask that the United States Attorney be required to state the object of this examination, his purpose.

Mr. Thompson: Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a Government officer, was an assumed character and what he was doing

just immediately prior to June 14, 1942 is very relevant on that issue.

The Court: I will permit the question, subject to conditions later. If it isn't connected, it may be stricken.

Mr. Hacker: I would like to make the further objection, if the Court please, upon the ground it is not the best evidence. If he wants to prove he is not a Government officer, the records of the government will prove that.

The Court: That objection will be overruled for the present.

Mr. Hacker: I desire an exception on the grounds stated in the objection.

The Court: Exception may be noted.

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

ARGUMENT

CITATIONS OF AUTHORITY

At the close of the Government's case, a motion was made for a directed verdict of "Not Guilty" on each and every count of the indictment, as appears in the Assignment of Error No. 1, which motion was by the Court denied. An examination

of the transcript of the Record on Appeal will disclose that the only evidence presented on the part of the Government as to the two counts in the indictment was confined to the testimony of Noble, one of the witnesses, and Elizabeth Lund, another of the witnesses, both of them accomplices in the alleged offense and co-conspirators thereto. There was absolutely no independent testimony or corroborating testimony offered by the Government except the testimony of these two witnesses.

It is a well recognized rule in all State Courts that a conviction of any person charged with a criminal offense cannot stand on the un-corroborated testimony of an accomplice or co-conspirator. It is true that in a Federal jurisdiction, the contrary has been held, but the jury is usually instructed in the language as follows:—

"The jury is instructed that in weighing the evidence all (in this case Edgar L. Noble) who is testifying for the Government, you should have due regard to the fact that he has pleaded guilty to the indictment, as well as of the fact of his being defendant, though not on trial. You are directed to weigh carefully his testimony and cautioned against placing too firm a reliance upon it, unless the same should be corroborated by testimony of witnesses other than principals or by other facts and circumstances that verify the testimony in material particulars."

This instruction was given and is in accordance with the decision rendered in the case of Orear vs. U. S., 261 F, Pages 257-260.

In this case now before the Court, there was no corroborating testimony, save and except that of one of the principals, Elizabeth Lund, at the time that this motion was made. Consequently, the Court should have granted the motion at the close of the Government's case and discharged the defendant and in not so doing, committed error as alleged in Assignment of Errors No. 1. It certainly cannot be denied that Elizabeth Lund was one of the principals in this entire transaction.

(See Transcript of Testimony commencing on Page 35 of Record On Appeal.)

ASSIGNMENT OF ERROR NO. 2

At the close of the entire case another motion was made for a directed verdict of not guilty on practically the same grounds as was made in Assignment No. 1. There was no further testimony introduced by the Government in support of the indictment and the only testimony presented was on the part of the defendant, Westenrider, which consisted of an express denial of all of the testimony given by the Government's witness with the exception that he was at the home of Mrs. Lund on two occasions.

(See Record on Appeal, Page 59.)

The motion for a directed verdict as constituting Assignment No. 2 was denied by the Court in its entirety.

It is a well known and universally recognized law that where a person is charged with a crime and the evidence adduced

and admitted at the trial is as consistent with his innocence as it is with his guilt, it is the duty of the jury to find such person not guilty; and we respectfully submit in support of the first and second Assignments of Errors that the evidence on the whole was as consistent with this defendant's innocence as it was with his guilt, and particularly in view of the fact that no corroborating testimony was offered or admitted outside of the testimony from the witness, Noble, and the witness, Mrs. Lund, who were, if any conspiracy at all existed, co-conspirators and principals in the entire transaction.

ASSIGNMENT OF ERROR NO. 3

This Assignment of Error No. 3 is based upon objections made by defendant's attorney to questions propounded to the witness, David W. Elkin, a witness presented by the Government.

(See Record on Appeal, Page 32.)

(Also for the full testimony of David W. Elkin, see Record on Appeal, Page 47.)

In the testimony of Elkin, it is self-evident and apparent that it was offered solely by the Government for the purpose of casting a suspicion upon the defendant, Westenrider, as a dissolute person and to arouse a prejudice in the minds of the jury against the defendant. It could have been done for no other purpose.

It will be observed, from the transcript of the Record on

Appeal, that the questions propounded to the Sheriff, Mr. Elkin, were propounded by the Government before the close of the Government's case, that the previous occupation of the defendant, Westenrider, was in no wise at issue in this trial. It was entirely immaterial and incompetent and the reason given by the District Attorney was a subterfuge after objections to the question, as propounded, "What was he doing there, if you know?"

(See Record on Appeal, Page 47.)

The Deputy United States Attorney stated to the Court:

"Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a government officer, was making a false representation, whether that was an assumed character and what he was doing just immediately prior to June 14, 1942, is very relevant on that issue."

(See Record on Appeal, Page 48.)

To which the Court stated:

"I will permit the question, subject to conditions later. If it isn't connected, it may be stricken."

Notwithstanding further objections, the Court permitted the witness, Elkin, to testify as to Westenrider's sojourn in Virginia City and what he was doing there, if anything.

(See Record on Appeal, Page 49.)

Such questions as were propounded to the witness, Elkin, are entirely immaterial and prejudicial when offered in the Government's case. They are permissible, at times, when offered by the defendant in order to establish his character for industry and other matters, but never, so far as we believe, is it admissible, by the Government.

In support of our position, we cite the Court to Corpus Juris Seccundum, Volume 22 at Page 929, Section 605, under the title, "Residence and Occupation of Accused", which is in part as follows, with the citations following thereto:

"Testimony as to the place of residence of defendant is germane, but his length of residence and his prior residence at other places are without pertinency. Some Courts hold that the occupation, past and present, of the accused in a criminal case are always admissible unless it is manifest that the purpose is to prejudice the jury against him, while others hold that such evidence is wholly irrelevant and inadmissible, and still other Courts hold that evidence of the previous occupation of the accused is admissible, if at all times it tends to establish good character."

Under this provision in the text, there are numerous citations in the note, particularly Notes 44, 45 and 46. Note 44 is a citation to U. S. vs. Taliaferro, C.C.A., Cal. and 47 Federal, 2nd 699. Note 45 cites the case of the State vs. Blasengame, 61 Southern, Page 219. Also found in 1932 L.A. at page 250, in which case the Court states the following:

"Where testimony concerning the occupations are connected

with the defendant in a criminal case is wholly irrelevant to the issue to be tried, and is likely to operate to his prejudice, its admission is reversible error."

A glance at the testimony of the witness, Elkin, as appears in the record, and the objections made thereto shows clearly that the testimony sought by the Government had no connection whatever with the charge contained in the indictment and it thus became absolutely irrelevant, incompetent and inadmissible, and it is very apparent that its only tendency would be to arouse suspicion in the minds of the jury derogatory to the defendant and thus tend to break down, in toto, his testimony relative to the transaction which, as stated, consisted solely in the denial of all of the testimony on the part of the Government. The very fact that the witness, Elkin, was a sheriff of Storey County in which Virginia City, Nevada, is situated, makes it very apparent that the purpose of the District Attorney in calling him was to cast a cloud upon the acts and conduct of the defendant, Westenrider. It would have more weight in casting such a cloud as, we refer to, than the testimony of any private individual. The mere fact that he was a sheriff would cause the jury to believe that he was a man of dissolute character and was under surveillance and suspicion on the part of the authorities.

We respectfully submit that in view of the record in this case and the connection of the witnesses with it, it should be reversed and remanded for a new trial.

.....

William L. Hacker

.....

M. B. Moore

Attorneys for Plaintiff.

No. 10,290

United States Circuit Court of Appeals for the Ninth Circuit

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLEE'S BRIEF

THOMAS O. CRAVEN,
United States Attorney.

BRUCE R. THOMPSON,
Ass't. United States Attorney.

WM. J. KANE,
Ass't. United States Attorney.

INDEX

CITATIONS

Cases:

Statutes:

Texts:

No. 10,290

United States Circuit Court of Appeals for the Ninth Circuit

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

JOHN WILLIAM WESTENRIDER, alias JOHN LEVI, the appellant, and EDGAR L. NOBLE were indicted in the United States District Court for the District of Nevada on September 2, 1942 (R. 2-5). The first Count of the indictment charged that appellant, John William Westenrider on June 14, 1942, at Carson City, Nevada, did wilfully, knowingly and feloniously, with the intent to defraud one Elizabeth E. Lund, falsely assume and pretend to be an officer or employee acting under the authority of the United States, to-wit: a government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations, and in such pretended character did obtain from said Elizabeth E. Lund a check to the order of

Edgar L. Noble for One Hundred Sixty-Seven Dollars ($167.00) R. 2-3). The second count of the indictment charged appellant, John William Westenrider and Edgar L. Noble with a conspiracy to commit the offense described in the first count; and as overt acts in furtherance of the conspiracy charged that: (1) on or about June 14, 1942, appellant and Edgar L. Noble accompanied one another in an automobile to 204 South Division Street, Carson City, Nevada; (2) on said day appellant falsely assumed and pretended to be a government investigator and inspector investigating alleged violations of the Federal Housing Administration laws and regulations; (3) on or about June 15, 1942, appellant demanded that Elizabeth E. Lund deliver to Edgar L. Noble a check drawn by Elizabeth E. Lund to the order of Edgar L. Noble in the sum of One Hundred Sixty-Seven Dollars ($167.00); (4) that on said day appellant and Edgar L. Noble transferred said check to one F. W. Buchanan, and received money and credits in return therefor. (R. 3-5).

Defendant, Edgar L. Noble, pleaded guilty to the second count of the indictment (R. 51). Appellant, John William Westenrider, pleaded not guilty to both counts of the indictment on September 12, 1942 (R. 6). Appellant was tried before a jury on September 29 and 30, 1942 (R. 7-11). The jury returned a verdict of guilty on both counts of the indictment (R. 11). On October 6, 1942, appellant was sentenced to serve eighteen months imprisonment on the first count and one year and one day imprisonment on the second count, sen-

tences to run concurrently (R. 13). On October 9, 1942, appellant served and filed his notice of appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 16-17).

Edgar L. Noble, the co-defendant, was engaged in the construction business with E. P. Hessee in Reno and Carson City, Nevada, in 1941 (R. 51). On October 30, 1941, Noble negotiated a contract to do remodeling work for Elizabeth E. Lund at 204 South Division Street in Carson City, Nevada (R. 38, 51). The contract price was One Thousand Dollars ($1,000.00), of which One Hundred Sixty-Seven Dollars ($167.00) was to be returned to Mrs. Lund (R. 39). The money for the contract price was obtained by negotiating a Federal Housing Administration loan (R. 43-44). Mrs. Lund received from E. P. Hessee part of the money borrowed on the F. H. A. loan in cash and spent it on the property herself (R. 58).

In June, 1942, Noble met appellant, John William Westenrider, in Reno, Nevada (R. 51). They discussed doing some roofing jobs together (R. 51). On June 12, 1942, they drove to Virginia City, Nevada, to see about the work. Noble explained to Westenrider how to handle F. H. A. jobs, and, among other things, explained that the F. H. A. loan could not exceed the contract price. He mentioned the Lund contract as an example of getting more money on the loan than was proper (R. 52). On the evening of Saturday, June 13, 1942, Noble and Westenrider drove from Virginia City, Nevada, to Carson City, Nevada. Enroute appellant, West-

enrider, suggested they see Mrs. Lund and make her give the money back and that Westenrider would be a special investigator. Noble agreed (R. 53, 55). They called on Mrs. Lund at 204 South Division Street in Carson City, Nevada, about 2:00 A. M., June 14, 1942. Noble pretended he had been arrested and was in Westenrider's custody (R. 36, 53). Westenrider told Mrs. Lund he was a government investigator (R. 36, 44) and suggested she had better straighten out the irregularities in her improvement loan to keep out of trouble (R. 37). Westenrider made a date to see her the next morning (R. 37). Noble and Westenrider visited Mrs. Lund again about noon the next day. Westenrider showed her the remodeling contract (Pl's. Ex. 1, R. 38-39) which stated that One Hundred Sixty-Seven Dollars ($167.00) would be returned. He also read her the criminal penalty from a warning notice on the regular F. H. A. Title I loan application form (Pl. Ex. 2, R. 41). Westenrider demanded One Hundred Sixty-Seven Dollars ($167.00) (R. 41, 44). Mrs. Lund gave him a check (Pl. Ex. #3, R. 42), for One Hundred Sixty-Seven Dollars ($167.00) drawn to the order of Edgar L. Noble, this in accordance with Westenrider's suggestion (R. 42). Westenrider and Noble then drove to Reno, Nevada, and cashed the check with F. M. Buchanan, dividing the money (R. 54, 50).

At the time of the foregoing events appellant, Westenrider, was not an investigator or inspector for the Federal Housing Administration, or in any manner connected with the F. H. A. (R. 56, 57).

Statutes Involved

Title 18, U. S.C. Sec. 76:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both. (Apr. 18, 1884, ch. 26, 23 Stat. 11; Mar. 4, 1909, ch. 321 § 32, 35 Stat. 1095; Feb. 28, 1938, ch. 37, 52 Stat. 83.)"

Title 18, U. S. C. Sec. 88:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (Mar. 4, 1909, ch. 321 § 37, 35 Stat. 1096.)"

Summary of the Argument

Appellant's motions for directed verdicts were properly denied. Elizabeth E. Lund was neither a principal in, nor an accomplice in the commission of the offenses alleged. She was the victim. Hence, the conviction does

not rest upon the uncorroborated testimony of an accomplice. The testimony of an accomplice is sufficient to sustain a conviction without corroboration.

The court did not err in overruling the objection to the question propounded Sheriff David Elkin, a witness. If error was committed, appellant was not prejudiced. The alleged error, not having been asserted as a ground for appeal in appellant's Notice of Appeal, is not properly raised. The alleged error is not properly presented because the Assignment of Error No. III does not quote the substance of the evidence admitted.

Argument

I.

The District Court correctly denied appellant's motions for a directed verdict of acquittal made on the ground that the evidence was insufficient to warrant a conviction.

Appellant's first and second assignments of error assert error in the court's orders overruling the motions for a directed verdict of acquittal made at the close of appellee's case (R. 7), and at the close of the entire case (R. 10). The grounds for the assertions of error are the same, that the evidence was insufficient because it consisted of the uncorroborated testimony of accomplices. The argument is based on the unfounded statement that Elizabeth E. Lund, a government witness, was a "principal" or "accomplice" in the commission of the offenses charged.

A "principal" is defined by Section 550, Title 18, U. S. C., as follows:

> "Whoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (Mar. 4, 1909, ch. 321, §332, 35 Stat. 1152)."

"An accomplice is 'one who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime.' *People v. Bolanger,* 71 Cal. 19, 11 Pac. 799; *State v. Roberts*, 15 Ore. 197, 13 Pac. 896. To render one an accomplice, 'he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction.' *People v. Smith,* 28 Hun. (N. Y.) 626." The foregoing quotation is from *Holmgren v. United* States (9CCA) 156 Fed. 439.

In *Diggs v. United States,* (9CCA) 220 Fed. 545, the court, discussing the meaning of the word "accomplice," cites with approval the following:

> "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried. 12 Cyc. 445. Where a penal statute is intended for the protection of a particular class of persons, one of that class does not become an accomplice by submitting to the injury. 1 McClain, Criminal Law, Sec. 199."

In the instant case, the government witness, Elizabeth E. Lund, was the victim of the criminal action of ap-

pellant. She was not an accomplice or principal. She did not aid, assist or participate in the commission of the offense. She could not have been indicted with appellant for the offense. She is one of the class of persons Section 76 of Title 18 U. S. C. is designed to protect, and she did not become an accomplice in the commission of the offense by submitting to appellant's extortionate demands.

Further, the rule is well settled in the federal courts that the uncorroborated testimony of accomplices is sufficient to warrant and sustain a conviction.

> *Lung v. United States* (9CCA) 218 Fed. 817,
> *Diggs v. United States* (9CCA) 220 Fed. 545,
> *Hass v. United States* (9CCA) 31 Fed. 2d. 13.

II.

The trial court did not err in overruling appellant's objection to the question asked Sheriff Elkin, a government witness, regarding the occupation and activities of appellant prior to the commission of the instant offense.

Appellant's third assignment of error alleges that prejudicial error was committed when the court overruled appellant's objection to a question propounded to David W. Elkin, a government witness (R. 47-49).

In the first place, the question was relevant and material. Appellant was charged with falsely impersonating a federal officer or employee. The falsity of this represented character was in issue. Defendant's occupation and activities prior to the commission of the

offense bear directly upon this issue. In this respect, the case differs from the ordinary criminal case where the occupation of defendant is not in issue.

Secondly, if the court's ruling was erroneous, defendant, nevertheless, was not prejudiced by the answer elicited (R. 49). There is nothing in the answer which reflects against the appellant, his character or reputation. Harmless error is no ground for reversal.

28 U. S. C. 391.

Thirdly, if error was committed, the point is not properly before this court, appellant having failed in his assignment of error(Assignment of Error No. III, R. 33) to quote the full substance of the evidence admitted. This is required by Rule 2(b), Criminal Appeals, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit (page 23).

In the fourth place, if error was committed, the point is not properly before this court, appellant having failed to include the alleged error as one of his grounds for appeal stated in his Notice of Appeal (R. 17).

See: *United Cigar Whelan Stores Corp. v. United States* (10 CCA) 113 F. 2d. 340.

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS O. CRAVEN,
United States Attorney.
BRUCE R. THOMPSON,
Ass't. United States Attorney.
WM. J. KANE,
Ass't. United States Attorney.

No. 10292

United States
Circuit Court of Appeals

For the Ninth Circuit.

BABOQUIVARI CATTLE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

No. 10292

United States
Circuit Court of Appeals

For the Ninth Circuit.

BABOQUIVARI CATTLE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

ROTARY COLORPRINT. 590 FOLSOM ST., SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Taxpayer:
JOHN W. TOWNSEND,
LLOYD FLETCHER, Esq.,

For Commissioner:
R. C. WHITLEY
E. L. CORBIN

Docket No. 103848

BABOQUIVARI CATTLE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1940

July 18—Petition received and filed. Taxpayer notified. Fee paid.

July 18—Request for Circuit hearing in Washington, D. C., filed by taxpayer. 7/19/40 copy served.

July 19—Copy of petition served on General Counsel.

July 27—Amendment to petition filed by taxpayer. 7/29/40 copy served on General Counsel.

Sept. 17—Answer filed by General Counsel.

1940

Sept. 17—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Sept. 30—Hearing set Oct. 23, 1940, on motion. Answer served.

Oct. 23—Hearing had before Mr. Mellott on request of petitioner for Washington, D. C., calendar. On request of respondent for Los Angeles, Calif. Granted to Washington, D. C., calendar.

Oct. 23—Order that proceeding be placed on the Washington, D. C., calendar for hearing on the merits entered.

Aug. 16—Hearing set Nov. 5, 1941.

Nov. 5—Hearing had before Mr. Mellott on the merits. Submitted. Appearance of Lloyd Fletcher, Jr., filed. Stipulation of facts filed. Petitioner's brief due 12/5/41. Respondent's brief due 12/20/41. Petitioner's reply brief due 1/5/42.

Nov. 13—Transcript of hearing 11/5/41 filed.

Dec. 5—Brief filed by taxpayer. 12/5/41 copy served.

Dec. 19—Motion for extension to Feb. 18, 1942, to file brief filed by General Counsel. 12/22/41 granted to Feb. 2, 1942.

1942

Feb. 18—Motion for leave to file the attached brief, brief lodged filed by General Counsel. 2/19/42 granted. 2/19/42 served.

1942

Mar. 18—Motion for leave to file the attached reply brief. Reply brief lodged, filed by taxpayer. 3/19/42 granted. 3/19/42 served on General Counsel. [1*]

Jun. 16—Opinion rendered. Mellott, Div. 11. Decision will be entered for the respondent. 6/16/42 copy served.

Jun. 16—Decision entered. Arthur Mellott, Div. 11.

July 15—Motion for rehearing and reconsideration of the opinion promulgated 6/16/42 and to vacate the decision entered June 16, 1942. (Brief in support thereof attached.) Filed by taxpayer.

July 20—Motion for rehearing and to vacate decision. Denied.

Sept. 14—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.

Sept. 14—Proof of service filed by taxpayer.

Oct. 16—Agreed praecipe for record filed. [2]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 103848

BABOQUIVARI CATTLE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice (IT:LA:PB-90D) dated April 20, 1940, and as a basis of its proceeding alleges as follows:

1. The petitioner is an Arizona corporation with principal office at Santa Margarita Ranch, Tucson, Arizona. The returns for the periods here involved were filed with the Collector of Internal Revenue at Phoenix, Arizona.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on April 20, 1940.

3. The taxes in controversy are income taxes for the calendar years 1937 and 1938 and in the aggregate amount of $1,220.06.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in including in petitioner's gross income payments received by it from the United States under the Soil Conservation and Domestic Allotment Act, in the amounts of $3,586.89 and $3,247.74 for the years 1937 and 1938, respectively.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: [3]

(a) Petitioner is a corporation, organized and existing under the laws of the State of Arizona, and engaged in the business of raising cattle and other livestock for purposes of sale. In furtherance of such purpose, petitioner owns and operates a ranch located in the Southwestern part of Pima County, Arizona, consisting of approximately 7,319 acres of patented land (land owned outright by petitioner), 45,880 acres of land leased from the State of Arizona, and 4,000 acres of lands owned by the United States and allocated to petitioner under the Taylor Grazing Act, in all a total of approximately 57,200 acres. Petitioner's ranch is improved with various water developments, fences, corrals, loading chutes, barns, pipe lines, and general ranch improvements and equipment.

(b) Said ranch is located in a hot, semi-arid region, most of the rainfall occurring during three summer months. Due to climatic and geographical conditions, lands in said region are subject to erosion.

(c) During the taxable years involved petitioner received sums of money from the United States as follows:

1937	$3,586.89
1938	$3,247.74

(d) Said sums of money were received by petitioner pursuant to the provisions of the Soil Conservation and Domestic Allotment Act (Act of February 29, 1936, 49 Stat. 163) to reimburse it for expenditures made by it for participating during the years 1937 and 1938 in approved range-building practices under the Federal Range Conservation Programs for the Western Region of the United States.

(e) As an approved participant in said 1937 Range Conservation Program, petitioner completed the following work in connection with the improvement and rehabilitation of portions of eroded lands on its ranch:

(1) A dirt reservoir on land leased from the State was repaired and enlarged by petitioner in 1937 in order to control the natural drainage of the area and to prevent water from running off the higher areas so that rehabilitation of the public lands leased by petitioner and other lessees might thereby be promoted.

(2) In order to divert water from deep washes, spread it over theretofore barren land and into the dirt reservoir above men-

tioned, petitioner in 1937 built five additional structures on the State leased land included in its ranch. This erosion control project reclaimed approximately 3600 acres of State land leased by petitioner and materially lessened erosion on an adjacent tract [4] containing approximately 3600 acres. Said project also furthered the accumulation of water in the dirt reservoir above mentioned, thereby increasing the grazing area in the vicinity and lessening the concentration of grazing in other areas throughout the range occupied by petitioner and other ranches. The elimination of concentrated grazing is a material factor in the lessening of soil erosion.

(3) In order to prevent the concentration of cattle on portions of the range which might become overgrazed, two and three-fourths miles of drift fence were also constructed by petitioner in 1937 on State leased land.

(f) As an approved participant in said 1938 Range Conservation Program, petitioner completed the following work in connection with the improvement and rehabilitation of portions of eroded lands on its ranch:

(1) Five dirt reservoirs were repaired and rebuilt in 1938, two of which were located on land leased from the State. The remaining three reconstructed reservoirs were located on land owned by petitioner. Prior

to this work, the said reservoirs were dry during certain portions of the year, and, as a consequence, cattle would concentrate in the vicinity of other water supplies, resulting in portions of the range becoming a problem area because in time they might become overgrazed.

(2) An entirely new dirt reservoir was constructed in 1938. It was located on State leased land in an area that theretofore had not been available for grazing. By thus opening up a new grazing area concentrated grazing in other areas was lessened, with consequent elimination of soil erosion in such areas.

(3) Petitioner also constructed in 1938 a cement rubble masonry dam, containing 60 cubic yards of masonry. Said dam was located on State leased land and in a mountainous area theretofore not grazed by live stock. This was done with a view to preventing soil erosion by the dispersion of concentrated groups of grazing cattle from other water supply points.

(g) The said work done by petitioner under the Range Conservation Programs for 1937 and 1938 inured not only to the benefit of lands owned or leased by petitioner but also to the benefit of other lands in the same range or region. [5]

(h) In its participation in the Range Conservation Programs for 1937 and 1938, petitioner, in all respects, complied with the provisions of the aforementioned Soil Conservation and Domestic Allotment Act and the regulations issued thereunder. The payments made to petitioner, as set forth in Paragraph (c) above, were made on recommendation of the range examiner and on the approval of petitioner's application for said payments by the Pima County Range Conservation Committee. The amounts of said payments were arrived at by the use of a formula that took into consideration the acreage and vegetative density of petitioner's range land, said formula being devised by the Federal Government.

(i) In petitioner's books of account the cost of all said improvements has been treated as a capital item, carried in an account entitled "Improvements Under Federal Aid", and not charged to Profit and Loss account. The reimbursements of said costs, received from the United States as aforesaid, have been treated as credit to Capital Surplus.

(j) The cost of the work so done by petitioner in 1937 and 1938 exceeded the amounts so received from the United States.

(k) In his audit of petitioner's income tax returns, respondent has included in its income, subject to the Federal income tax, said amounts

aggregating $3,586.89 for 1937 and $3,247.74 for 1938.

(l) Petitioner is advised and therefore alleges: that no part of the said sums received constituted income taxable to it under the applicable Revenue Acts; that the said sums do not constitute income to petitioner, within the meaning of the Sixteenth Amendment to the Federal Constitution; and that nothing in the provisions of the applicable Revenue Acts, or the Soil Conservation and Domestic Allotment Act, requires or permits the inclusion of said sums in petitioner's taxable income for the years 1937 and 1938.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that petitioner is liable to no deficiencies in income taxes for the years 1937 and 1938.

JOHN W. TOWNSEND
1366 National Press Bldg.,
Washington, D. C.
Attorney for Petitioner.

Of Counsel
CROMELIN, TOWNSEND, BROOKE & KIRKLAND [6]

State of Arizona
County of Pima—ss.

Carlos E. Ronstadt, being duly sworn, says that he is President of the petitioner above named, and that he is duly authorized to verify the foregoing

petition; that he has read the same and is familiar with the statements contained therein; and that the statements contained therein are true to the best of his knowledge, information, and belief.

CARLOS E. RONSTADT

Subscribed and sworn to before me this ..... day of July, 1940.

[Seal] .....

Notary Public [7]

EXHIBIT "A"

SN-IT-1

TREASURY DEPARTMENT
Internal Revenue Service
12th Floor,
U. S. Post Office and Court House,
Los Angeles, California.
Apr 20, 1940

Los Angeles
IT:LA
PB-90D

Baboquivari Cattle Company,
Santa Margarita Ranch,
Tucson, Arizona.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1937 and 1938 disclose a deficiency of $1,220.06 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Los Angeles, California, for the attention of IT:LA:FC. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By /s/ GEORGE D. MARTIN
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver. [8]

STATEMENT

IT:LA
PB-90D

Baboquivari Cattle Company,
Santa Margarita Ranch,
Tucson, Arizona.

Tax Liability for the Taxable Years Ended
December 31, 1937
and
December 31, 1938

	Year	Liability	Assessed	Deficiency
Income tax	1937	$1,490.97	$ 695.37	$ 795.60
Income tax	1938	797.56	373.10	424.46
Totals		$2,288.53	$1,068.47	$1,220.06

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated August 4, 1939, and December 28, 1939, to your protest dated September 2, 1939, and to the statements made at the conferences held on October 24, 1939, November 27, 1939, and January 20, 1940.

A copy of this letter and statement has been mailed to your representative, Mr. James M. Lawton, Valley National Bank Building, Tucson, Arizona, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [9]

ADJUSTMENTS TO NET INCOME

Taxable year ended December 31, 1937

Net income as disclosed by return			$1,823.01
Additional income and unallowable deductions:			
(a)	Payments received from the United States	$3,586.89	
(b)	Loss disallowed	168.45	
(c)	Depreciation disallowed	1,336.18	
(d)	Error in inventory	1,000.00	
(e)	Adjustments of accounts	32.00	6,123.52
Net income adjusted			$7,946.53

EXPLANATION OF ADJUSTMENTS

(a) Payments amounting to $3,586.89 received by you in the taxable year from the United States Government under the Soil Conservation and Domestic Allotment Act constitute taxable income within the meaning of section 22(a), Revenue Act of 1936.

(b) The deduction of $168.45 for loss sustained upon an exchange of automobiles is disallowed in accordance with the provisions of section 112(b)(1) of the Revenue Act of 1936.

(c) The deduction for depreciation is disallowed to the extent of $1,336.18. Section 23(1), Revenue Act of 1936.

(d) The inventory of calves at the close of the taxable year was understated $1,000.00 due to a mathematical error, resulting in an understatement of income in the amount of $1,000.00.

(e) Miscellaneous adjustments of accounts, credited to capital surplus on your books, represent taxable income in the amount of $32.00.

You have signified your acceptance of the above adjustments except (a), and as a result of such acceptance the amount of $432.13 was assessed as a deficiency, which is taken into consideration in the computation of tax below. [10]

COMPUTATION OF INCOME TAX

Taxable year ended December 31, 1937

Normal Tax		
Taxable net income		$7,946.53
Normal-tax net income		$7,946.53
Normal tax:		
8% of $2,000.00	$160.00	
11% of 5,946.53	654.12	
Total normal tax		$ 814.12
Surtax on Undistributed Profits		
Taxable net income		$7,946.53
Less: Normal tax		814.12
Adjusted net income		$7,132.41
Undistributed net income		$7,132.41
Surtax:		
7% of $5,000.00	$350.00	
12% of 713.24	85.59	
17% of 1,419.17	241.26	
Total surtax		$ 676.85
Total income tax (normal tax and surtax)		$1,490.97
Income tax assessed (normal tax and surtax):		
Original, account No. 40552	$263.24	
Additional, Dec. 22, 1939, No. 529000	432.13	
Total assessed		695.37
Deficiency of income tax		$ 795.60

ADJUSTMENTS TO NET INCOME

Taxable year ended December 31, 1938

Net income as disclosed by return		$2,306.30
Additional income and unallowable deduction:		
(a) Payments received from the United States	$3,247.74	
(b) Depreciation disallowed	1,678.52	4,926.26
Total		$7,232.56
Additional deduction:		
(c) Error in inventory		1,000.00
Net income adjusted		$6,232.56

EXPLANATION OF ADJUSTMENTS

(a) Payments amounting to $3,247.74 received by you in the taxable year from the United States Government under the Soil Conservation and Domestic Allotment Act constitute taxable income within the meaning of section 22(a), Revenue Act of 1938.

(b) The deduction for depreciation is disallowed to the extent of $1,678.52. Section 23(1), Revenue Act of 1938.

(c) The inventory of calves at the beginning of the year was understated $1,000.00, resulting in an overstatement of income of $1,000.00.

You have signified your acceptance of the above adjustments except (a), and as a result of such acceptance the amount of $84.81 was assessed as a deficiency, which is taken into consideration in the computation of tax below. [12]

COMPUTATION OF INCOME TAX

Taxable year ended December 31, 1938

Taxable net income		$6,232.56
Amount subject to income tax		$6,232.56
Income tax:		
12½% of $5,000.00	$625.00	
14% of 1,232.56	172.56	
Total income tax		$ 797.56
Income tax assessed:		
Original, account No. 41117	$288.29	
Additional, Feb. 16, 1940, No. 529000	84.81	
Total assessed		373.10
Deficiency of income tax		$ 424.46

[Endorsed]: U.S.B.T.A. Filed Jul. 18, 1940. [13]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1937 and 1938; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5. (a) to (d), inclusive. Admits the allegations contained in subparagraphs (a) to (d), inclusive, of paragraph 5 of the petition.

(e) to (h), inclusive. Denies the allegations contained in subparagraphs (e) to (h), inclusive, of paragraph 5 of the [16] petition.

(i) Admits the allegations contained in subparagraph (i) of paragraph 5 of the petition.

(j) Denies the allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits the allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Denies the allegations contained in subparagraph (l) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL,
FTH
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Alva C. Baird,
Division Counsel.
Frank T. Horner,
E. A. Tonjes,
Special Attorneys,
Bureau of Internal Revenue.

EAT/nm 8/29/40

[Endorsed]: USBTA Filed Sep. 17, 1940. [17]

[Title of Board and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter set forth may be taken and accepted by the Board of Tax Appeals at the trial of this proceeding as if fully proven by competent evidence, both parties reserving the right to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioner, Baboquivari Cattle Company, is a corporation organized and existing under and by virtue of the laws of the State of Arizona and during 1937 and 1938 was engaged in the operation of a cattle ranch known as the Santa Margarita Ranch, comprising approximately 57,200 acres of land located in the southwest portion of Pima County, Arizona. Of the total acreage comprising the ranch 7,319 acres were owned outright by the petitioner, 45,880 acres were owned by the State of Arizona, and 4,000 acres were owned by the United States Government. It filed its Federal income and excess-profits tax returns for the years 1937 and 1938 with the Collecter of Internal Revenue for the District of Arizona.

2. The land owned by the State of Arizona was held by petitioner pursuant to certain Grazing Leases executed by petitioner and the State Land Department of the State of Arizona, pursuant to the laws of that State, [18] each lease covering a

specified parcel of land and providing for a term certain. The land owned by the United States was held by petitioner pursuant to provisions of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended.

3. During 1937 and 1938 the petitioner made certain improvements to the ranch under the provisions of the Soil Conservation and Domestic Allotment Act (Act of February 29, 1936, 49 Stat. 163) for which it received payments or reimbursements from the United States in 1937 in the amount of $3,586.89 and in 1938 in the amount of $3,247.74.

4. In the petitioner's books of account the cost of the above improvements was not charged to profit and loss account but rather was treated as a capital item and carried into an asset account entitled "Improvements under Federal Aid". The amounts received by the petitioner in 1937 and 1938 as reimbursements for the cost of said improvements were treated as a credit to capital surplus.

5. Of the total amount received in 1937 none represented reimbursements or payments for improvements made on land owned outright by the petitioner, $3,586.89 on land owned by the State of Arizona, and none on land owned by the United States Government. Of the total amount received in 1938 $899.10 represented reimbursements or payments for improvements made on land owned outright by the petitioner, $2,348.64 on land owned by the State of Arizona, and none on land owned by the United States Government.

6. In the audit of petitioner's returns for 1937 and 1938 the Commissioner included the entire amounts so received in its gross income for those years.

7. It is further stipulated and agreed that the affidavit of Carlos E. Ronstadt, executed February 1, 1941, attached hereto and marked Exhibit 1, [19] may be received in evidence in this case with like effect as though the said Carlos E. Ronstadt personally appeared before the Board and testified to the matters and facts set forth in said affidavit, and that the four exhibits attached to the said affidavit of Carlos E. Ronstadt marked Exhibits "A", "B", "C", and "D" may be received in evidence in this case as petitioner's Exhibits.

8. The petitioner's ranch is situated on the watershed of the Gila River, a tributary of the Colorado River.

(Sgd) JOHN W. TOWNSEND,
Attorney for Petitioner.

(Sgd) J. P. WENCHEL,
RES
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: USBTA Filed Nov. 5, 1941. [20]

[Title of Board and Cause.]

AFFIDAVIT OF CARLOS E. RONSTADT

State of Arizona,
County of Pima—ss.

Carlos E. Ronstadt, being first duly sworn, deposes and says:

That he is now and since prior to 1936 has been President of the Baboquivari Cattle Company, a corporation organized and existing under the laws of the State of Arizona, and by reason thereof is personally familiar with the matters and facts hereinafter set forth.

Said Baboquivari Cattle Company is the petitioner in the above-entitled proceeding. It is now and at all times material hereto was engaged in raising cattle and livestock for sale on its ranch properties located in the southwest part of Pima County, Arizona, said ranch properties consisting of approximately 57,200 acres. There is attached hereto, marked Exhibit "A", a map of said ranch prepared by engineers of the Agricultural Adjustment Administration, United States Department of [21] Agriculture.

Pursuant to the provisions of the Soil Conservation and Domestic Allotment Act, as amended, and to regulations promulgated thereunder by the Secretary of Agriculture, known as the "1937 Agricultural Conservation Program—Western Region Bulletin No. 101-Arizona", and amendments thereto, petitioner corporation made application for range-

building payments provided by such laws and regulations. Such application was approved, there being attached hereto, marked Exhibit "B", the original of a letter dated July 16, 1937, from C. B. Brown, Secretary, Pima County Agricultural Conservation Association, to Carlos Ronstadt, President, Baboquivari Cattle Company, authorizing the company to proceed with certain range improvements. There is also attached hereto, marked Exhibit "C", duplicate original of "Report on Examination of Range Land" bearing certificate of Range Examiner, W. K. Koogler, dated July 7, 1937, recommending and outlining the projects to be undertaken on the company's ranch, and including the company's application for permission to carry out the same.

Pursuant to the authorization set forth in said letter of July 16, 1937, and to supplemental instructions thereafter received, said corporation in the year 1937 constructed and completed the following work in connection with the improvement and rehabilitation of portions of eroded lands on its said ranch:

(1). A reservoir or dirt tank on land leased by the corporation from the State of Arizona was repaired and enlarged in 1937 in order to [22] control the natural drainage of the area, and to prevent water from running off the higher areas, so that rehabilitation of the public lands leased by petitioner and other lessees might thereby be promoted. Said reservoir was

approximately 100 yards in diameter, with side retaining walls permitting an approximate depth of eighteen feet of water.

(2). In order to divert water from deep washes and spread same over theretofore barren land and into the reservoir above mentioned, the corporation in 1937 also built several dikes or embankments on land leased from the State. These erosion control projects reclaimed approximately 3600 acres of State land leased by the corporation and materially lessened erosion on adjacent tracts containing approximately 3600 acres. Said projects also furthered the accumulation of water in the reservoir above mentioned, and thereby increased the grazing area in the vicinity, with consequent lessening of the concentration of grazing in other areas throughout the range occupied by petitioner and other ranches.

(3). In order to prevent the concentration of cattle on portions of the range which might become over-grazed, two and three-fourths miles of drift fence were also constructed by the corporation in 1937 on lands leased from the State.

Upon inspection and approval of said construction work by officials of the Department of Agriculture, petitioner corporation was paid by the United States Government, pursuant to said laws and regulations, the sum of Three Thousand Five Hundred Eighty-six and 89/100 Dollars ($3,586.89). Said

amount exceeded the maximum of Three Thousand Four Hundred [23] Eighty-Seven and 50/100 Dollars ($3,487.50) stated in said letter of July 16, 1937, by reason of the fact that additional funds were thereafter made available for the promotion of the 1937 range conservation program in the State of Arizona.

Petitioner corporation also made application for range-building payments under the 1938 Federal Range Conservation Program—Western Region, pursuant to the laws and regulations providing therefor, and said application was approved. There is annexed hereto, marked Exhibit "D", duplicate original copy of "Report of Approved Range Building Practices (1938 Range Conservation Program—Western Region)" issued to Baboquivari Cattle Company, dated October 24, 1938, and signed by Carl E. Teeter, Executive Officer of the State Committee.

Pursuant to said report and the authorization therein contained, petitioner corporation, during the year 1938, completed the following work in connection with the improvement and rehabilitation of portions of eroded lands on its ranch:

(1). Five large reservoirs or earthen tanks were repaired and rebuilt in 1938, two of which were located on land leased from the State. The remaining three reconstructed reservoirs were located on land owned by the corporation. Prior to this work, the said reservoirs were dry during certain portions of the year, and,

as a consequence, cattle would concentrate in the vicinity of other water supplies, resulting in portions of the range becoming a problem area because in time it might become overgrazed. [24]

(2). An entirely new reservoir, or earthen tank, was constructed in 1938. This provided for impounding water with an area of approximately 250 by 400 feet and an approximate depth of 10 feet. This involved construction of a dam with a base approximately 30 feet and top 10 feet in thickness. It was located on land leased from the State of Arizona in an area that theretofore had not been available for grazing. By thus opening up new grazing areas, concentrated grazing in other areas was lessened, with consequent elimination of soil erosion due to possible overgrazing.

(3). The corporation also constructed in 1938 a cement rubble masonry dam containing approximately 60 cubic yards of masonry. Said dam was located on land leased from the State in a mountainous area theretofore not grazed by livestock. This was erected with a view to preventing soil erosion by the dispersion of concentrated groups of grazing cattle from other water supply points.

Upon inspection by Government officials and approval of the work completed by the company in 1938, it received from the United States Government, pursuant to said laws and regulations, the

sum of Three Thousand Two Hundred Forty-seven and 74/100 ($3,247.74).

In the region in which the petitioner's ranch is located, soil erosion has resulted in great part because of overgrazing of lands, resulting in the elimination of vegetation which would normally hold the soil in place during the heavy rains which are usually concentrated in the summer months of the year. For many years neither the Federal [25] Government nor the State of Arizona promoted soil conservation programs, nor provided restrictions on grazing upon public lands. The range programs adopted in recent years have tended to eliminate over-concentration of grazing. However, it will take many years and a carefully planned program of soil erosion control to rebuild the ranges depleted and eroded through lack of foresight and planning in former years.

The construction of earthen reservoirs and diversion dikes in connection therewith, and the construction of rubble masonry dams in mountainous areas not only make available permanent supplies of water for stock, thereby spreading the grazing livestock over a larger area and maintaining a more constant ground covering, which is a decided factor in the prevention of soil erosion by rapid run-off of water, but also retard the flow of water and allow uplands to absorb more moisture, thereby serving the twofold purpose of prevention of erosion in lowlands and the spreading of livestock in the uplands.

The said work done by petitioner corporation under the Range Conservation Programs for 1937 and 1938 inured not only to the benefit of lands owned or leased by it but also to the benefit of lands in the same range or region, owned or leased by other persons or corporations.

The cost to it of the construction work so done by petitioner corporation in each of the years 1937 and 1938 [26] exceeded the amounts which it received in each of said years from the United States as hereinbefore set forth.

The amounts so received were only approved for payment after inspection by Government officials and after careful measurement by them of the quantities of fill or excavation, and the number of feet of fence, said payments being arrived at by allowing the amounts per cubic yard prescribed by the regulations, or the amounts allowed per rod for fence construction.

CARLOS E. RONSTADT

Subscribed and sworn to before me this 1st day of February, 1941.

G. I. LEWIS,
Notary Public.

My commission expires: January 10, 1945. [27]

[Title of Board and Cause.]

Docket No. 103848. Promulgated June 16, 1942.

Benefit payments made by the United States for carrying out approved range improvement practices under the Soil Conservation and Domestic Allotment Act are includable in gross income.

Lloyd Fletcher, Jr., Esq., and John W. Townsend, Esq., for the petitioner.

E. L. Corbin, Esq., for the respondent.

OPINION

Mellott: The Commissioner made several adjustments to the net income shown by petitioner's returns for 1937 and 1938 and determined deficiencies in income tax in the respective amounts of $795.60 and $424.46. The sole error charged in the petition is the inclusion in gross income of $3,586.89 for 1937 and $3,247.74 for 1938, these being the amounts received from the United States under the Soil Conservation and Domestic Allotment Act.[1] All of the facts have been stipulated, admitted in the pleadings, or shown in documents received in evidence without objection and are found accordingly.

Petitioner, an Arizona corporation engaged in the operation of a cattle ranch and keeping its books upon the accrual basis, filed its returns with

---

[1]Act of April 27, 1935 (49 Stat. 163), as amended by Act of February 29, 1936 (49 Stat. 1148).

the collector of internal revenue for the district of Arizona. The ranch comprises 57,200 acres of land in Pima County, Arizona, 45,880+ being owned by the state, 4,000 by the United States and 7,319+ by petitioner. During the taxable years the land owned by the state was held by petitioner under grazing leases duly executed under the laws of Arizona for terms of from five to ten years and the land owned by the United States was held by petitioner under the provisions of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1296), as amended. The land is in a hot, semiarid region in the watershed of [34] the Gila River, a tributary of the Colorado River. The major portion of the rainfall occurs during three summer months and because of climatic and geographical conditions the lands owned or held by petitioner and surrounding lands are subject to substantial erosion.

During the taxable years petitioner constructed or rebuilt on the ranch some dirt reservoirs and earthen tanks, constructed a rubble masonry dam, built two miles of drift fence, deepened a well, and developed a spring or seep. Before these improvements were undertaken a range grazing examiner, working in conjunction with the Pima County Range Conservation Committee, had made a survey of petitioner's ranch and a report recommending that the improvements be made. The first report was approved by the committee on or about July 16, 1937. On that date the committee advised petitioner in writing: "Upon notification

by you * * * that one or more of these recommended improvements have been completed, the County Committee will inspect same and upon approval, will submit to you an application to be signed for benefit payment." The letter also advised petitioner, in accordance with the Soil Conservation and Domestic Allotment Act, supra, and the regulations issued thereunder:[2] "Number of animal units 2325 which times $1.50 per head, will enable you to earn a maximum payment of $3,487.50." Substantially the same procedure was followed in 1938, the total allowance, computed upon the number of acres and number of animal units, being $3,247.74.

Upon completion of a portion of the work in 1937 the contemplated notification was given, application was filed and approved, and payment was authorized and made to petitioner in the amount of $3,586.89. Upon completion of the remainder of the work in 1938 payment was made in the amount of $3,247.74. The cost of the work in each year exceeded the amounts received by petitioner from the United States. In petitioner's books of account the cost of the improvements was not charged to profit and loss, but was treated as a capital item and carried into an asset account en-

---

[2]Western Region Bulletin No. 101, Arizona, Federal Register Feb. 26, 1937, p. 345; W. R. B. Arizona Supp. I, Federal Register, June 5, 1937, p. 1141; W. R. B. 101, Arizona Supp. II, Federal Register July 27, 1937, p. 1554.

titled "Improvements under Federal Aid." The amounts received by petitioner in the taxable years were treated as credits to capital surplus. In its returns of income the amounts were shown as carried upon petitioner's books; but neither was included in its gross income. The Commissioner added each of them to the net income reported.

All of the improvements in 1937 were made upon land owned by the State of Arizona and held by petitioner under lease. Of the total amount received by petitioner in 1938, $899.10 (in the language of [35] the stipulation) "represented reimbursements or payments for improvements made on land owned outright by the petitioner, $2,348.64 on land owned by the State of Arizona, and none on land owned by the United States Government." While we have found all of the facts to be as stipulated, we think it is more accurate to say that benefit payments were received by petitioner in the amounts shown above for carrying out the range improvement practices recommended by the range examiner and approved by the Pima County Agricultural Conservation Association in accordance with the regulations prescribed by the Secretary of Agriculture under the Soil Conservation and Domestic Allotment Act, supra. So much, then, for the basic facts.

The Act of April 27, 1935, (49 Stat. 163) directed the establishment of an agency in the Department of Agriculture to be known as the "Soil

Conservation Service" and provided that the Secretary of Agriculture should assume all obligations incurred by the Soil Erosion Service prior to its transfer to the Department. Congress "recognized that the wastage of soil and moisture * * * resulting from soil erosion, is a menace to the national welfare" and declared its policy to be "to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, and maintain the navigability of rivers and harbors, protect public health, public lands and relieve unemployment * * *." It therefore authorized the Secretary of Agriculture to conduct surveys, investigations, and research relating to the character of soil erosion and the preventive measures needed, to carry out preventive measures, and:

> (3) To cooperate or enter into agreements with, or to furnish financial or other aid to, any agency, governmental or otherwise, or any person, subject to such conditions as he may deem necessary, for the purposes of this Act.

As a condition to extending any benefits under the act to lands not owned by the United States the Secretary of Agriculture was authorized to acquire: (1) the enactment and reasonable safeguards for the enforcement of state and local laws imposing suitable permanent restrictions on the use of the lands and otherwise providing for the pre-

vention of soil erosion; (2) agreements or covenants as to the permanent use of such lands; and (3) contributions in money, services, materials, or otherwise, to any operations conferring such benefits. He was also authorized to secure the cooperation of any governmental agency, to continue employees of the organization theretofore established for the purpose of administering the provisions of the act with relation to the prevention of soil erosion, and to expend the funds theretofore appropriated for such purpose. [36]

The excerpts from the report of the Senate Committee on Agriculture and Forestry shown in the margin[3] indicate the magnitude of the problem and the reason for the enactment of the legislation.

---

[3]Recognizing that, unless soil erosion can be controlled on farm, grazing, and forest lands, the prosperity of the United States cannot be permanently maintained, the bill provides for the coordination of all Federal activities with relation to soil erosion.

Heretofore, soil-erosion control has been among several groups in the different Departments. The present bill coordinates all of these groups and places the control under the Secretary of Agriculture. Experiences of recent storms, both flood and wind, demonstrate the necessity to prevent wastage of soil, the conservation of water, and the control of floods. The silting of reservoirs, the maintaining of the navigability of rivers and harbors, the protection of public lands, all justify Federal responsibility for the carrying out of a national erosion-control program.

Vast areas of agricultural lands are threatened with abandonment and the occupants thereof are

The Soil Conservation Act was amended February 29, 1936, by the addition of several new sections and it became the "Soil Conservation and Domestic Allotment Act." (49 Stat. 1148.) The most substantial change was through the addition of sections 7 and 8. Section 7, as explained in Report No. 1973 of the House Committee on Agriculture, 74th Cong., 2d sess., provided for Federal grants to the states to enable them to carry out plans developed by them to effectuate any one or more of the following purposes:

---

daily increasing the numbers on Federal relief rolls to the extent that this problem alone warrants an extensive Federal erosion-control program.

* * * * * * *

The aid authorized in this subsection will be necessary because, in general, the owner of private lands cannot bear the entire cost of controlling the erosion thereon. He has neither the technical knowledge nor the financial resources. Over tremendous areas, land destruction has proceeded to the point where it would be impossible to persuade or force the owners to assume the entire burden of control, nor would it be just to do so. Fundamentally, they have not been responsible for the erosion which has occurred. In the disposal of the public domain, settlers were encouraged to acquire the public lands and to cultivate them. With the transfer of ownership went no restrictions, instructions, or advice as to methods under which the land should be used in order to protect it from erosion.

Acting in good faith, the settlers used their land in the light of the best information available. Since it was not the initial fault of the settler that his land became subject to erosion, it would not be

(1) Preservation and improvements of soil fertility;

(2) Promotion of the economic use of land;

(3) Diminution of exploitation and of ununprofitable use of national soil resources; [37]

(4) Provision for and maintenance of a continuous and stable supply of agricultural commodities adequate to meet domestic and foreign consumer requirements at prices fair to producers and consumers; and

(5) Reestablishment and maintenance of farmers' purchasing power.

---

right to require him to bear the entire burden of repairing damage done or of preventing future damage. Furthermore, the interest of the Nation in Controlling erosion far exceeds that of the private landowners. An individual may destroy his land, move away, obtain a position somewhere else, accumulate capital, and purchase new land. For the Nation, land destroyed is land gone forever. This drain on the national resource is not immediately fatal, but, if the destruction continues unchecked, the time will come when remaining land resources will be insufficient to support our population on an adequate standard of living. The cost to the Nation of such changes would be incalculable. Moreover, erosion directly threatens vast Federal investments in dams and channels and annually requires the expenditure of large sums for dredging operations. The only practical method of eliminating these hazards and costs is to control the erosion on private lands, and it would not be equitable to require the owner of these lands to make expenditures for the protection of Federal investments.

* * * * * * *

Each state was left free to accept or refuse the benefits and it was contemplated that no citizen of a state should have any relation, contractual or otherwise, with the Federal Government.

As a temporary expediency the Secretary of Agriculture, under section 8, was given power to make payments of grants or other aid to agricultural producers determined by him to be fair and reasonable in connection with the effectuation of the purposes specified in section 7, measured by: (1) the treatment or use of their land or a part thereof for soil restoration, soil conservation or the prevention of erosion; (2) changes in the use of their land; (3) a percentage of their normal production of any one or more agricultural commodities designated by the Secretary equaling the percentage of the normal national production of such commodity or commodities required for domestic consumption; or (4) any combination of the above. In determining the amount of any payment or grant measured by (1) or (2) the Secretary was required to take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which the payment was made. He was authorized to utilize county and community committees of agricultural producers, the agricultural extension service, and other approved agencies in carrying out the provisions of the act, but he was specifically denied the power "to enter into any contract binding upon any producer or to acquire any land or

any right or interest therein." In administering section 8 the Secretary was required in every practical way to encourage and provide for soil conserving and soil rebuilding practices rather than the growing of soil depleting commercial crops. To carry out the purposes of sections 7 and 8 there was authorized to be appropriated for any fiscal year an amount not in excess of $500,000,000.

Under date of January 14, 1937, the Seccretary, pursuant to the authority vested in him under section 8 of the act promulgated regulations under which payments would be made to farmers, tenants, ranch operators, sharecroppers, etc., in the State of Arizona. A ranch operator was defined to be "a person who as owner, cash tenant, or share tenant operates or a person who acts in similar capacity in the operation of a ranching unit." A ranching unit was "all range land which is used by the ranch operator as a single unit in producing range live stock with farm machinery, work stock and labor, substantially separate from that of any other range land." A range building payment was stated to mean "a payment for the carrying [38] out of approved range building practices" and a range building allowance was defined as "the largest amount for any ranching unit which may be earned as a range building payment on such ranching unit." Animal unit was defined as "one cow, one horse, 5 sheep, 5 goats or the equivalent thereof" and grazing capacity or range land was stated to mean "that number of animal

units which such land will sustain on a twelve-month basis over a period of years without injury to the range forage, tree growth or watershed." (Western Region Bulletin, No. 101, Arizona, supra.)

Under part IV of the regulations the rates and conditions of range building payments were set out. As particularly applicable to the presently stipulated facts they were: 15 cents per cubic yard of fill or excavation for constructing earthen pits or reservoirs with adequate spillways; $1 per linear foot for drilling or digging a well; $50 for digging out a spring or seep and protecting the source from trampling; 30 cents per rod for constructing cross fences or drift fences; and 3 cents per linear foot for the establishment of fire guards. Under section 2 of part IV of the regulations the range building allowance for any ranching unit was to be "equal to $1.50 times the grazing capacity of the range land in the ranching unit."

Application for range building payments could be made only by ranch operators and payments were to be made only upon application filed with the county committee. The grazing capacity for each ranching unit was to be established only upon a report submitted by the range examiner who, in examining the range and making his report thereon, was required to take into consideration: (a) composition, palatability, and density of growth; (b) climatic fluctuations; (c) distribution

and character of watering facilities; (d) topographic and cultural features; (e) classes of live stock; (f) presence or absence of rodents and poisonous plant infestations; and (g) previous use.

The regulations were amended June 3, 1937 (W. R. B. No. 101, Arizona, Supplement I, supra) to provide that payment be made for carrying out on range land in 1937 such range building practices as were approved by the county committee for the ranching unit prior to their institution, provided the payments did not exceed the range building allowance for the ranching unit. They were further amended under date of July 23, 1937 (W. R. B. 101, Arizona, Supplement II, Federal Register, July 27, 1937, p. 1554) in particulars not presently important.

Rather extended reference has been made to the act and regulations under which the payments in issue were made for two reasons: First, because this is the first proceeding before the Board in which the taxability of such payments has been in issue; and second, because, [39] notwithstanding the stipulation of the parties to the effect that the payments were "reimbursements or payments for improvements made on land owned outright by petitioner * * * or by the State of Arizona", we feel that they were nothing but benefit payments for carrying out approved range improvement practices recommended by the range examiner and approved by the county conservation committee. With

this background and acting upon the assumption that our question is essentially whether benefit payments are income to the recipient, we give consideration to the several contentions made by petitioner upon brief, though not in the order presented by it.

May the payments be construed to be gifts and therefore exempt from taxation under section 22 (b) (3) of the Revenue Act of 1936? Petitioner urges that they should be, pointing out that the Secretary of Agriculture had no power under the act to "enter into any contract binding upon any producer", that the United States received no direct consideration in goods or services for the payments made, and that the act itself refers to the payments as "grants." The only case cited is United States v. Hurst, 2 Fed. (2d) 73. In that case the United States District Court for the District of Wyoming followed Union Oil Co. v. Smith, 249 U. S. 337, which recognized that a locator and discoverer of mineral rights upon vacant lands of the United States had a possessory right in the land, capable of conveyance, inheritance or devise, and held that the acquisition of such a right under the United States statutes partook "more of the nature of a gift than that of any other method of acquiring title to property known to the law." It also held that if Congress had desired to exclude from its exemption of gifts any particular kind it would have so declared.

It may be assumed for present purposes that the conclusion of the Court was correct under the facts before it; but we do not believe that the payments now in issue can be construed to be gifts. Under the Soil Conservation and Domestic Allotment Act it was not intended that the Government should make "a voluntary transfer of real or personal property without any consideration", "a donation", "a present", or that it should "voluntarily bestow something of value without expectation of return." The very theory of the legislation was that the Government and the landowner or tenant should cooperate in preventing soil erosion, the Government intending, not to bind a landowner or tenant to make any particular improvement, but to give him a "benefit payment", if earned, after inspection of the completed work was required to be performed voluntarily and that the Secretary of Agriculture was without power to enter into any binding contracts with the owner or operator before the completion of the work, is not sufficient, in our [40] judgment, to make the payments mere gifts. We hold, therefore, that the amounts in issue may not be excluded from gross income under section 22 (b) (3), supra.

The taxation of the payments to it, says the petitioner, would pro tanto reduce the benefits granted by the Soil Conservation and Domestic Allotment Act and thus defeat the very purpose of Congress. This, it contends, "argues strongly that

the payments were not intended by Congress to be subject to taxation as income." The only cases cited in support of this contention are those holding that tax-imposing statutes are to be construed strictly against the Government and all doubt resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151; Crooks v. Harrelson, 282 U. S. 55. In our judgment the cited cases are not applicable. Petitioner's assertion that this is a case where there is a presumption against the taxability of the amounts received is not supported by any authorities, nor does it point to any specific statute allowing an exemption from tax. The act under which the payments were made was passed while the income tax laws were in full force and effect. It must be presumed that Congress was aware of their provisions. Since it did not see fit to incorporate in the act a provision exempting benefit payments, the conclusion that it intended them to be taxed is inescapable. Cf. Pacific Co. Ltd. v. Johnson, 285 U. S. 480; Sun-Herald Corporation v. Duggan, 73 Fed. (2d) 298; United States v. Stewart, 311 U. S. 60.

The briefs of the parties are largely devoted to a discussion of the rule enunciated by the Supreme Court in Edwards v. Cuba Railroad Co., 268 U. S. 628, and its applicability to the stipulated facts. Stated generally, it is that a contribution to the capital assets of a railroad company in order to induce construction and operation of rialroads for

the service of the public, does not constitute income to the recipient within the meaning of the Sixteenth Amendment. The cited case has been followed many times by the courts and this Board. In Liberty Light & Power Co., 4 B. T. A. 155, citizens of a community, desiring to obtain electric service, transferred to the taxpayer transmission lines which they had constructed. In Texas & Pacific Railway Co. v. United States, 52 Fed. (2d) 1040; affirmed on another issue, 286 U. S. 285, and Kauai Railway Co., Ltd., 13 B. T. A. 686, contributions were made to railroad companies by business concerns for the construction of spur or side tracks and for other construction work. In Chicago & Northwestern Railway Co. v. Commissioner, 66 Fed. (2d) 61; certiorari denied, 290 U. S. 672, the taxpayer received an allowance from the Government for undermaintenance of its railroad during Federal control. In Frank Holton & Co., 10 B. T. A. 1317, property to be used as a factory was conveyed to the taxpayer to induce it to locate in that city, and in Arkansas Compress Co., 8 B. T. A. 155, contributions of land and cash [41] were made to the taxpayer to induce it to erect and operate cotton compresses and warehouses. In each case it was held that the taxpayer was not in receipt of taxable income. See also Great Northern Railway Co., 8 B. T. A. 225; affd., 40 Fed. (2d) 372; certiorari denied, 282 U. S. 855; Baltimore & Ohio Railroad Co., 30 B. T. A. 194;

Decatur Water Supply Co. v. Commissioner, 88 Fed. (2d) 341; Valley Waste Disposal Co., 38 B. T. A. 452; and Detroit Edison Co., 45 B. T. A. 358 (on appeal, C. C. A., 6th Cir.).

But while the rule of the cited case has been followed many times, it has been found to be inapplicable to many payments made by the sovereign to a taxpayer. The Court of Claims, in Texas & Pacific Railway Co. v. United States, supra, citing a number of cases decided by this Board in which it was held that amounts received by railroad companies under the provisions of the Transportation Act to make good an operating deficit for the six-month period after termination of Federal control were income (Gulf, Mobile & Northern Railroad Co., 22 B. T. A. 233; affd., 293 U. S. 295, and others), came to the same conclusion, though the railroads were relying upon Edwards v. Cuba Railroad Co. The Supreme Court affirmed, saying —"The sums * * * were not subsidies or gifts." Texas & Pacific Railway Co. v. United States, supra. See also Continental Tie & Lumber Co. v. United States, 286 U. S. 290. The amounts paid to railroad companies as just compensation for the taking and use of their properties during Federal control were also held to be income (Kansas City Southern Railway Co. v. Commissioner, 52 Fed. (2d) 372; certiorari denied, 284 U. S. 676, affirming on this point 16 B. T. A. 665), although the taxpayers relied upon the rule of the Cuba Railroad

Co. case. In Burke-Divide Oil Co. v. Neal, 73 Fed. (2d) 857; certiorari denied, 295 U. S. 740, the amount received from the United States through the Secretary of the Interior, representing the taxpayer's equitable portion of an amount which had been accumulated and impounded pending termination of litigation in connection with oil and gas claims which, in good faith, had been developed in the bed of the Red River, was held to be income. Under somewhat similar facts the same conclusion was reached in Obispo Oil Co. v. Welch, 85 Fed. (2d) 860, the case, however, being reversed by the Supreme Court (301 U. S. 190) upon other grounds. In Marine Transport Co. v. Commissioner, 77 Fed. (2d) 177, affirming Marine Transport Co., 28 B. T. A. 566, it was held that an award made to the petitioner by the Mixed Claims Commission on account of the destruction of a schooner in 1917 was not, as contended by it, a gratuity or bounty but compensation for property destroyed. Payment of the sum of $23,000 by the State of Maryland to a ferry company was held, in Helvering v. Claiborne-Annapolis Ferry Co., [42] 93 Fed. (2d) 875, to be compensation for operation of the ferry and hence includable in gross income. A shipping company, which had received a very favorable contract for the carrying of the mails and which had agreed to impound a portion of its earnings to be expended for additional vessels, was required to include in income the amounts impounded during the taxable years, notwithstanding

its contention that they were either parts of a Government subsidy usable only for capital purposes or not income within the definition in Eisner v. Macomber, 252 U. S. 189. Lykes Bros. Steamship Co., 42 B. T. A. 1935; affd., 126 Fed. (2d) 725. Edwards v. Cuba Railroad Co. was cited and relied upon in each of the cited cases but found to be inapplicable.

In the preceding paragraphs reference has been made to practically all of the cases in which Edwards v. Cuba Railroad Co. has been cited or discussed. They indicate that the doctrine has been sparingly applied. It has been pointed out above that the payments in issue were made for cooperating in the soil conservation program. They were denominated "benefit payments." They were made under the same law and regulations that payments were made for refraining from raising cotton or sugar beets, for devoting a portion of the acreage to the raising of leguminous crops, taking steps to eradicate rodents and noxious weeds, furrowing on the contour, withholding land from grazing, or following out other approved practices for building up the soil and preventing erosion. It is true that the Government had not bound the landowners, by contract, to perform any of the practices; but it, by its regulations and adoption of the program, held out to them the incentive that payment would be made if the practices were followed out. In other words, the Government was in somewhat the same situation that a private individual would be

under an outstanding offer of purchase or sale at a given price. It told the landowners what was desired and agreed to pay those who complied with the established practices. Petitioner complied and received the payments. They, in our judgment, were income. Cf. Salvage v. Commissioner, 76 Fed. (2d) 112.

The bookkeeping entries made by petitioner following receipt of the payments are not determinative, if they have any significance whatever in the instant proceeding. No doubt its capital improvements were enhanced in value; but so would they have been if petitioner had elected, for instance, to expend money in eradicating rodents or noxious weeds, planting leguminous crops, furrowing on the contour, or following most any of the approved practices. We can not believe Congress ever intended that all such payments should be wholly exempted from tax. Nor are we persuaded that a different rule should be applied because, as suggested by petitioner, the [43] United States "admits responsibility for the conditions which necessitate the rehabilitation work." This is no doubt a real justification for the expenditure by the Government; but it does not justify a failure to tax one who is enriched thereby.

At the risk of unnecessarily extending this discussion it may be pointed out that if the payments to petitioner are not taxed as income in the year of receipt it will receive even more favorable treat-

ment than will be received by manufacturers of essential war materials and commodities, who are cooperating with the Federal Government in the present emergency. They, under Title III—Amortization Deduction, Second Revenue Act of 1940 (sec. 124, I. R. Code) and articles 19.124–1 to 19.124–9, Regulations 103, as amended by T. D. 5016, may amortize, over a 60-month period, the cost of facilities constructed by them for the manufacture of essential war commodities; but in determining the adjusted basis of such facilities all amounts received "in connection with * * * [their] agreement to supply articles for national defense, though denominated reimbursements for all or a part of the cost of an emergency facility, are not to be treated as capital receipts but are to be taken into account in computing income * * *." (Art. 19.124–6, Regulations 103.) In petitioner's returns of income it included, in its depreciable assets, "Improvements under Federal Aid $6978.52" and deducted as depreciation, a portion thereof based on the estimated life of the property. The claimed deduction has been allowed. It is apparent, therefore, that petitioner will recover, through amortization, depreciation and obsolescence, its total capital investment in the property. If the amounts received from the Government are not included in income, it, in effect, will have a double deduction. In the absence of specific legislation, it should not be assumed Congress intended that recipients of

benefit payments be singled out for such preferential treatment.

The Commissioner, in our judgment, committed no error in including the amounts in issue in petitioner's income. Since this is the only adjustment contested,

Decision will be entered for the respondent.

Reviewed by the Board. [44]

United States Board of Tax Appeals
Washington

Docket No. 103848

BABOQUIVARI CATTLE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its opinion promulgated June 16, 1942, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1937 and 1938 in the respective amounts of $795.60 and $424.46.

Enter:

(S) ARTHUR MELLOTT,
[Seal] Member.

Entered June 16, 1942. [45]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. Docket No. 103848

BABOQUIVARI CATTLE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the petitioner, Baboquivari Cattle Company, by John W. Townsend, its attorney, and respectfully shows to this Honorable Court as follows:

I.

The petitioner is an Arizona corporation with principal office at Santa Marguerita Ranch, Tucson, Arizona, and files this petition for review in its own right. The respondent, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

II.

The controversy involves the proper determination of petitioner's Federal income tax liability for

the years 1937 and 1938. In a deficiency notice dated April 20, 1942, respondent determined a deficiency of $795.60 in income tax of the petitioner for the calendar year 1937 and a deficiency of $424.46 in income tax of the petitioner for the calendar year 1938. From such determination the petitioner duly prosecuted an appeal to the [46] United States Board of Tax Appeals. The case was heard by the Board in due course at Washington, D. C., on November 5, 1941. All of the facts were stipulated by the parties, admitted in the pleadings, or shown in certain documentary exhibits received in evidence without objection. On June 16, 1942, the Board promulgated its findings of fact and opinion sustaining the respondent's determination, and on June 16, 1942 entered its decision, pursuant to said opinion, determining that there are deficiencies in income taxes for the years 1937 and 1938, in the respective amounts of $795.60 and $424.46. On July 15, 1942, the petitioner filed its Motion for Rehearing and To Vacate Decision, together with its brief in support of said motion. Said motion was denied by the Board on July 20, 1942.

III.

Petitioner seeks a review of the Board's said decision by the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of Section 1142 of the Internal Revenue Code. This Court has jurisdiction of the proceeding by virtue of the provisions of Section 1141 of

the Internal Revenue Code, the returns of tax, in respect of which respondent determined the contested deficiencies, having been filed in the Office of the Collector of Internal Revenue for the State of Arizona, at Phoenix, Arizona.

IV.

The controversy in this case arises by reason of the following circumstances:

The petitioner is, and during the taxable years, was engaged in the operation of a cattle ranch known as the Santa Marguerita Ranch, comprising approximately 57,200 acres of land located in Pima County, Arizona. Of the total acreage 45,880 acres were owned by the State of Arizona, 4000 acres [47] were owned by the United States, and 7319 acres were owned outright by the petitioner. During the taxable years the land owned by the State was held by petitioner under grazing leases duly executed under the laws of Arizona for terms of from five to ten years, and the land owned by the United States was held by petitioner under the provisions of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended.

This land is in a hot, semi-arid region in the watershed of the Gila River, a tributary of the Colorado River. The major portion of the rainfall occurs during three summer months. Because of climatic and geographical conditions, the lands owned or held by petitioner, together with the surrounding lands, are subject to substantial erosion.

During the taxable years involved petitioner received sums of money from the United States as follows:

1937	$3,586.89
1938	3,247.74

These sums were received by petitioner pursuant to the provisions of the Soil Conservation and Domestic Allotment Act (Act of February 29, 1936, 49 Stat. 163) to reimburse it for expenditures made by it while participating during those years in approved range building practices under the Federal Range Conservation Programs for the Western region of the United States.

Petitioner's participation in the range building program during the years involved consisted principally of the construction or rebuilding on its ranch of certain dirt reservoirs and earthen tanks, together with a rubble masonry dam. In addition petitioner built over two miles of drift fence, deepened a well, and developed a spring, or seep. These improvements were recommended by a range grazing examiner, working in conjunction with the Pima County Range Conservation Committee. Pursuant to petitioner's application, and after completion and approval of these recommended improvements, [48] the above mentioned payments were made to it by the United States, by way of reimbursement for the cost of such improvements.

The cost of the work done by petitioner in each year exceeded the amounts received by it from the

United States. In the petitioner's books of account the cost was not charged to profit and loss account but was treated as a capital item and carried into an asset account entitled "Improvements Under Federal Aid". The amounts received by petitioner in the taxable years were treated as credits to capital surplus.

The total amount received in 1937 represented a reimbursement or payment for improvements made altogether on land owned by the State of Arizona. Of the total amount received in 1938, $899.10 represented reimbursement or payment for improvements made on land owned outright by the petitioner, $2,348.64 on land owned by the State of Arizona, and none on land owned by the United States. These improvements made by petitioner under the Federal Range Conservation Programs for 1937 and 1938 inured not only to the benefit of lands owned or leased by it but also to the benefit of lands in the same range or region, owned or leased by other persons or corporations.

In its returns of income the said amounts were shown as carried upon petitioner's books, but neither sum was included in its taxable income. The Commissioner, however, added each of them to the net income reported, which action resulted in the controverted deficiencies.

V.

The petitioner says that in the record and proceedings before the Board of Tax Appeals, and in

the decision entered by said Board, manifest errors occurred to the prejudice of the petitioner, and it asserts and assigns the following errors, which it avers occurred: [49]

(a) The Board erred in holding that the payments of $3,586.89 and $3,247.74 made to petitioner by the United States during the years 1937 and 1938, respectively, as a result of petitioner's participation in approved range building practices under the Soil Conservation and Allotment Act, were income to petitioner.

(b) The Board erred in failing to hold that the payments so made to petitioner represented reimbursements to petitioner for capital expenditures made by it, and thus should be considered as non-taxable contributions to petitioner's capital assets.

(c) The Board erred in failing to hold that the taxation of such payments to petitioner as income would serve to reduce the benefits granted by the Soil Conservation and Domestic Allotment Act, thus serving to defeat the very purpose of Congress.

(d) The Board erred in failing to hold that such payments constituted gifts to petitioner, and were therefore exempt from taxation under Section 22 (b) (3).

(e) The Board erred in holding and deciding that there are deficiencies in petitioner's income taxes for the years 1937 and 1938 in the respective amounts of $795.60 and $424.46.

Wherefore, petitioner prays that the decision of the Board of Tax Appeals in this proceeding be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

JOHN W. TOWNSEND,
1366 National Press Building,
Washington, D. C.
Attorney for Petitioner.

Of Counsel:
CROMELIN, TOWNSEND, BROOKE & KIRKLAND.

[Endorsed]: USBTA Filed Sep. 14, 1942. [50]

United States Board of Tax Appeals
Washington

Docket No. 103848

BABOQUIVARI CATTLE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 53, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 19th day of October, 1942.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 10292. United States Circuit Court of Appeals for the Ninth Circuit. Baboquivari Cattle Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed October 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 10292

BABOQUIVARI CATTLE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF THE RECORD TO BE OMITTED IN PRINTING

In the appeal of the above-entitled case, petitioner adopts and intends to rely on the points covered by its assignment of errors set forth in paragraph V of the Petition for Review filed herein.

In preparing the record in the above-entitled case please print the record as certified by the Clerk of the United States Board of Tax Appeals, with the exception of the following numbered pages:

Pages 14 to 15. Being Amendment to Petition, together with perfected verification.

Pages 28 to 33. Being Exhibits B, C, and D attached to Stipulation herein.

Pages 51 to 52. Being Notice of Filing Petition for Review, together with proof of service thereof on Counsel for respondent.

Pages 52 to ... Being Praecipe for record.

Pages .. to ... Being Order extending the time for the transmission and delivery of the record to the Clerk of the Court.

JOHN W. TOWNSEND,
LLOYD FLETCHER, JR.,
Attorneys for Petitioner.

Service of a copy of the foregoing Statement of Points and Designation of Portions of the Record to be Omitted in Printing is hereby acknowledged this 3rd day of November, 1942.

J. P. WENCHEL,
Attorney for Respondent.

[Endorsed]: Filed Nov. 7, 1942.

10292

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 10292

BABOQUIVARI CATTLE COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONER'S BRIEF.

Upon Petition to Review a Decision of the Tax Court of the United States.

JOHN W. TOWNSEND,
LLOYD FLETCHER, JR.,
National Press Building,
Washington, D. C.

RALPH W. BILBY,
T. K. SHOENHAIR,
Valley National Bank Building,
Tucson, Arizona,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

CASES CITED.

OTHER AUTHORITIES.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 10292

BABOQUIVARI CATTLE COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONER'S BRIEF.

JURISDICTIONAL STATEMENT.

Petitioner is a corporation organized and existing under the laws of the State of Arizona, and during 1937 and 1938 was engaged in the operation of a cattle ranch known as the Santa Margarita Ranch, located in the Southwest portion of Pima County, Arizona. (R. 19) It filed its Federal income and excess profits tax returns for those years with the Collector of Internal Revenue for the District of Arizona. (R. 19) The respondent, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The controversy involves the proper determination of

the Federal income tax liability of petitioner for the calendar years 1937 and 1938. In a deficiency notice dated April 20, 1940, the Commissioner determined deficiencies in income taxes of petitioner for such years in the aggregate amount of $1,220.06. (R. 4, 11, 13) From such determination petitioner duly prosecuted an appeal to The Tax Court of the United States.* (R. 4-11) On June 16, 1942, the Tax Court promulgated its opinion sustaining the Commissioner's determination, and on the same day entered its decision determining deficiencies in petitioner's income taxes for the years 1937 and 1938 in the respective amounts of $795.60 and $424.46. (R. 29-50)

Thereafter, on September 14, 1942, petitioner filed its Petition for Review (R. 51-57), seeking a review of the Tax Court's decision by this Court, pursuant to the provisions of Sec. 1142 of the Internal Revenue Code. (53 Stat. 1) This Court has jurisdiction of the proceeding by virtue of the provisions of Sec. 1141 of the Internal Revenue Code (53 Stat. 1), the returns of tax, in respect of which the Commissioner determined the contested deficiencies, having been filed in the office of the Collector of Internal Revenue for the State of Arizona.

Statutes and Regulations Involved.

Sec. 22 of the Revenue Acts of 1936 (49 Stat. 1648) and 1938 (52 Stat. 447) provides in part as follows:

> "(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the

* This tribunal was then known as the United States Board of Tax Appeals. Its official name was changed to The Tax Court of The United States by Title V, Sec. 504, of the Revenue Act of 1942, amending Sec. 1100, I. R. C., and, for purposes of convenience, it will be referred to throughout this brief as the Tax Court.

transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

(b) EXCLUSIONS FROM GROSS INCOME.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * *

(3) GIFTS, BEQUESTS AND DEVISES.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income); * * *."

Relevant provisions of the Soil Conservation and Domestic Allotment Act (H. R. 7054, Public No. 46, 74th Cong., approved April 27, 1935, 49 Stat. 163, as amended by S. 3780, Public No. 461, 74th Cong., approved Feb. 29, 1936, 49 Stat. 1151) are set forth in Appendix "A" hereto. Pursuant thereto the Department of Agriculture promulgated regulations entitled "1937 Agricultural Conservation Program-Western Region, Bulletin No. 101—Arizona," issued on January 14, 1937, and published in the Federal Register, Vol. 2, No. 38, page 435, as amended by a supplement issued June 3, 1937, and published in the Federal Register, Vol. 2, No. 108, page 1141, and further amended by a supplement issued July 23, 1937, and published in the Federal Register, Vol. 2, No. 143, page 1554.

QUESTION INVOLVED.

Where a participant in approved range-building practices under the Federal Range Conservation Programs, as provided for in the Soil Conservation and Domestic Allotment Act, receives sums of money from the United States as reimbursement for expenditures made by the participant, in pursuance of such approved programs, are such sums includible in the taxable income of the participant?

Statement of the Case.

At no time has there been any controversy regarding the material facts in this proceeding. (R. 29) The case was submitted to the Tax Court upon a stipulation signed by the parties, (R. 19-21) certain documentary exhibits, (some of which were deemed immaterial by the parties for the purposes of this appeal and were therefore omitted from the Record), and the affidavit of Mr. Carlos E. Ronstadt, petitioner's President, (R. 22-28). The parties stipulated that this affidavit might be received in evidence with like effect as though Mr. Ronstadt personally appeared and testified to the matters set forth therein. (R. 21) In addition, certain material facts pleaded in the petition were admitted in the Commissioner's answer. (R. 17-18)

In his deficiency notice dated April 20, 1940, the Commissioner determined alleged deficiencies of $795.60 for 1937 and $424.26 for 1938. (R. 11-17) These deficiencies result solely from the inclusion in petitioner's taxable income of amounts received by it from the United States as payment for approved projects constructed by petitioner pursuant to the Soil Conservation and Domestic Allotment Act. (R. 14, 16, 21, 29)

Petitioner's cattle ranch comprises approximately 57,200 acres of land located in the southwest portion of Pima County, Arizona. (R. 19, 30) Of the total acreage comprising this ranch, 7,319 acres were owned outright by the petitioner; 45,880 acres were owned by the State of Arizona and held by petitioner pursuant to certain grazing leases executed by petitioner and the State Land Department of the State of Arizona, in accordance with the laws of that state, each lease covering a specified parcel of land and providing for a term of five years (R. 19-20, 30); and 4,000 acres were owned by the United States and were held by petitioner pursuant to the provisions of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended. (R. 19-20, 30)

Petitioner's ranch is located in a hot, semi-arid region, most of the rainfall occurring during the three summer

months. It is situated on the water shed of the Gila River, a tributary of the Colorado River. Due to climactic and geographic conditions, lands in this region are subject to substantial erosion. (R. 5, 18, 30)

In the summer of 1937, a range grazing examiner, working in conjunction with the Pima County Range Conservation Committee established under the Soil Conservation Program, had made a survey of petitioner's ranch, and issued a report recommending that certain improvements be made thereon. (R. 30) This report was approved by the Committee on or about July 16, 1937, and pursuant to such authorization and the instructions contained therein, the petitioner constructed or rebuilt on its ranch a series of dirt reservoirs and earthen tanks, constructed a rubble masonry dam, built more than two miles of drift fence, deepened a well, and developed a spring or seep. (R. 30)

Upon the completion of a portion of this work in 1937, an application for reimbursement was filed by petitioner and approved by the Committee. (R. 20, 25, 31) Payment was authorized and made to petitioner during 1937 in the amount of $3,586.89, this sum having been computed in accordance with the regulations issued under the Soil Conservation and Domestic Allotment Act. (R. 20, 25, 31)

Upon completion of the remainder of the authorized work in 1938, payment was made in the amount of $3,247.74. (R. 20, 27, 31) The amounts so received by petitioner were only approved for payment after inspection by Government officials and after careful measurement by them of the quantities of fill or excavation and the number of feet of fence, said payments being arrived at by allowing the amount per cubic yard prescribed by the regulation, or the amounts allowed per rod for fence construction. See "1937 Agricultural Conservation Program—Western Region, Bulletin No. 101—Arizona," *supra.* (R. 28)

The cost to it of the construction work so done by petitioner in each of the years 1937 and 1938 exceeded the amounts which it received in each of such years from the United States as hereinbefore set forth. (R. 28, 31) In

the petitioner's books of account, kept on an accrual basis (R. 29), the cost of the above improvements was not charged to Profit and Loss, but rather was treated as a capital item and carried into an asset account, entitled "Improvements Under Federal Aid." (R. 20, 31-32) The amounts received from the United States as reimbursement were then treated as a credit to Capital Surplus. (R. 20, 32)

In its returns of income such amounts were shown as carried upon petitioner's books, but neither was included in its gross income. (R. 32) The Commissioner added each of them to the net taxable income reported. (R. 14, 16, 32)

Specification of Errors.

The petitioner asserts that in the proceedings before The Tax Court, and in the opinion and decision entered by it, errors occurred to the prejudice of petitioner, and it asserts and assigns the following errors and points upon which it relies:

(1) The Tax Court erred in holding that the payments of $3,586.89 and $3,247.74 made to petitioner by the United States during the years 1937 and 1938, respectively, as a result of petitioner's participation in approved range building practices under the Soil Conservation and Domestic Allotment Act, were income to petitioner.

(2) The Tax Court erred in failing to hold that the payments so made to petitioner represented reimbursements to petitioner for capital expenditures made by it, and thus should be considered as non-taxable contributions to petitioner's capital assets.

(3) The Tax Court erred in failing to hold that the taxation of such payments to petitioner as income would serve to reduce the benefits granted by the Soil Conservation and Domestic Allotment Act, *supra,* thus serving to defeat the very purpose of Congress.

(4) The Tax Court erred in failing to hold that such payments constituted gifts to petitioner, and were therefore exempt from taxation under Section 22 (b) (3) of the Revenue Acts of 1936 and 1938, *supra.*

(5) The Tax Court erred in holding and deciding that there are deficiencies in petitioner's income taxes for the years 1937 and 1938 in the respective amounts of $795.60 and $424.46.

Summary of Argument

I. The taxation of the payments or grants to petitioner would *pro tanto* reduce the subsidies granted by the Soil Conservation and Domestic Allotment Act, and thus serve to defeat the very purpose of Congress; and the presumption is against their taxability.

II. It was error on the part of the Tax Court to ignore the subsidizing nature of these grants and to hold and to stress them to be "benefit" payments.

III. The payments do not constitute taxable income within the meaning of the Sixteenth Amendment, being mere contributions to the recipient's capital assets.

1. The tax Court erred in failing to hold that the principle of *Edwards* v. *Cuba Railroad Co.,* 268 U. S. 628, controls this case, and in omitting to find that no material feature of this case serves to distinguish it from that case.

2. The principle enunciated by the Supreme Court in *Edwards* v. *Cuba Railroad Co., supra,* has been followed time and again by the Circuit Courts of Appeals and the Tax Court.

3. No case cited by the Tax Court serves to invalidate the contentions of petitioner in this case.

4. It was error to hold that the payments here involved are taxable on the assumption that wholly different classes of payments under the same act may be taxable.

IV. It was error to support the Tax Court's conclusion by considering the effect of an uncontested depreciation deduction in respect of the range improvements.

V. The grants may be construed to be gifts to petitioner, and therefore exempt from taxation under Sec. 22(b)(3).

ARGUMENT.

I. The taxation of the payments or grants to petitioner would pro tanto reduce the subsidies granted by the Soil Conservation and Domestic Allotment Act, and thus serve to defeat the very purpose of Congress; and the presumption is against their taxability.

There is a very practical reason for not regarding the payments as taxable. If taxed, then to the extent of the tax the recipient's payments are thereby reduced. It is hardly to be presumed that Congress intended to recapture or retake part of the very sums it appropriated to accomplish the specific purposes of the Soil Conservation and Domestic Allotment Act. There is certainly no language in that Act that even suggests that the payments or grants shall be subject to an income tax.

In the region in which petitioner's ranch is located, soil erosion has resulted in great part because of over-grazing of land, resulting in the elimination of vegetation, which would normally hold the soil in place during the heavy rains which are usually concentrated in the summer months of the year. For many years neither the Federal Government nor the State of Arizona promoted soil conservation programs, nor did they provide restrictions on grazing upon the public lands. The range programs adopted in recent years have tended to eliminate over-concentration of grazing, but it will take many years and a carefully-planned program of soil erosion control to rebuild the ranges depleted and eroded through lack of foresight and planning in former years. The construction of earthen reservoirs and diversion dikes in connection therewith, and the construction of

rubble masonry dams in mountainous areas make available additional permanent supplies of water for stock, thereby spreading the grazing livestock over a larger area and maintaining a more constant ground covering, which is a decided factor in the prevention of soil erosion by rapid run-off of water. Such construction also retards the flow of water and allows uplands to absorb more moisture, thereby serving the two-fold purpose of preventing erosion in the lowlands and the spreading of livestock in the uplands. (R. 27.)

It should be unnecessary to submit arguments that Congress intended by the soil conservation provisions primarily to conserve and protect the natural resources of the United States for the general public welfare, rather than to provide for a profit or gain to an individual citizen. The purposes of the legislation are not only set forth in the title and preamble to the Act of April 27, 1935, (Appendix "A" hereto) but are considered at great length in the Committee Reports to Congress in connection with H. R. 7054 and S. 3780. For the convenience of the Court, we have set forth in Appendix B hereto several rather lengthy quotations from those reports, which establish beyond doubt the intent of Congress in enacting the laws under which the payments were made to petitioner.

In the instant case, the evidence shows that petitioner expended more for the soil conservation projects it carried out than the amounts reimbursed to it. (R. 28, 31) Most of these projects were on land leased from the State of Arizona. (R. 20, 32) However, the improvement inured not only to the benefit of petitioner's ranch, but to the benefit of lands in the same range or region. (R. 28) In Senate Report No. 466 (Appendix "B" hereto) it was pointed out—

> "For the Nation, land destroyed is land gone forever. This drain on the national resources is not immediately fatal, but, if the destruction continues unchecked, the time will come when remaining land resources will be insufficient to support our population on an adequate standard of living. The cost to the Nation of such changes would be incalculable. Moreover, erosion di-

> rectly threatens vast Federal investments in dams and channels, and annually requires the expenditure of large sums for dredging operations. *The only practical method of eliminating these hazards and costs is to control the erosion on private lands, and it would not be equitable to require the owner of these lands to make expenditures for the protection of Federal investments.''* (Italics supplied)

It would be a strange anomaly to hold that, while, on the one hand, Congress appropriated funds to carry out erosion control and encourage conservation, on the other hand and at the same time, it intended to recapture, through the income tax, a portion of grants made for that purpose. That Congress had a contrary intent is clear. In Senate Report No. 1481 (Appendix ''B'' hereto) it was said:

> ''Thus, the bill lays out a plan for an ordered program designed to encourage sound soil conservation practices *without thereby diminishing farmers' incomes* or causing undue curtailment of supplies of agricultural commodities.''

The practical effect of the Tax Court's decision herein is to reduce the amount of the 1937 grant to petitioner of $3,586.89 by the tax thereon of $795.60, and to reduce the 1938 grant of $3,247.74 by the tax thereon of $424.46. These taxes must be paid out of petitioner's ordinary operating income. The full amounts received from the Government (and more) were expended for the range improvement projects constructed by petitioner. *Nothing was left over for taxes.*

As a price for its cooperation in the Government's soil conservation program, the Tax Court holds petitioner liable for these taxes. Such a holding surely serves to defeat the *express* Congressional intent of encouraging soil conservation ''without thereby diminishing farmers' income.'' Clearly, therefore, to tax the payments is to defeat the very purposes of the Soil Conservation and Domestic Allotment Act, and to reduce the sums available to the recipient with

which to carry out the desired conservation program. This argues strongly that the payments were never intended by Congress to be subjected to taxation as income.

The decision in this case, therefore, should be approached from the standpoint that the grants received by petitioner should not be taxed unless there be some provision in the tax laws that will permit no other conclusion. Neither the Tax Court nor respondent can or has pointed to such provision.

In this connection, it must be remembered that no tax can be imposed by implication, or by judicial construction. Tax statutes must be strictly interpreted against the Government, and all doubts resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151; *Crooks* v. *Harrelson,* 282 U. S. 55; *Cole* v. *Commissioner,* 81 Fed. (2d) 485; *Commissioner* v. *Bryn Mawr Trust,* 87 Fed. (2d) 607, 611. This is a "salutary policy." *In re Owl Drug Company,* (1937) (CCH Tax Service, Paragraph 9466). The Tax Court cited *Pacific Company, Ltd.* v. *Johnson,* 285 U. S. 480, *Sun-Herald Corp.* v. *Duggan,* 73 Fed. (2d) 298, and *U. S.* v. *Steward,* 311 U. S. 60, to support its conclusion that Congress intended to tax these payments, but none of them is in point. For the purposes of the present discussion, those cases simply hold that an *exemption section* of a taxing statute is to be construed strictly and doubt resolved in favor of the taxing power. That is far from saying that a tax may be imposed by implication, or judicial construction, where, as here, there is *no provision* in the tax laws or other applicable statutes specifically levying a tax on the amounts in question or otherwise pertaining thereto. In such a case, any doubt is to be resolved in favor of the taxpayer. See *Gould* v. *Gould, supra.*

The general rule may be conceded that exemptions are never granted on inference alone. However, as the Supreme Court has pointed out, this does not mean that the rule should be so grudgingly construed as to thwart the legislative purpose. *Trotter* v. *Tennessee,* 290 U. S. 354, 356. See *Bankers Trust Company et al, Executors* v. *Comm.,* 33 B. T.

A. 746. The rule is discussed and the correct distinction pointed out in Mertens, *"Law of Federal Income Taxation"* (1942), Section 3.07. That learned author states:

> "When public policy dictates a more liberal attitude, as with bequests for public purposes *and the performing by private means of what would ultimately entail public expense,* the Courts will not follow this general rule. Such an exemption is an act of public justice, not a matter of grace and favor . . ." (Italics supplied)

The many evidences of congressional intention in this case make pertinent a statement by the late Mr. Justice Holmes in "The Common Law", page 303 (1881). He said:

> "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered."

It seems clear that this is a case where the Court should presume against the taxability of the receipts. In such a holding this Court would be supported both by the practical aspects of the soil conservation legislation and by the rules of construction applicable to tax laws.

II. It was error on the part of the Tax Court to ignore the subsidizing nature of these grants and to hold and to stress them to be "benefit" payments.

Although the point is never expressly made, it is implicit in the Tax Court's opinion that it does not consider the grants made to petitioner as subsidies. For example, the Tax Court says, in its opinion (R. 40-41):

> "Notwithstanding the stipulation of the parties to the effect that the payments were 'reimbursement or payments for improvements made on land owned outright by petitioner . . . or by the State of Arizona', we feel that they were nothing but benefit payments for carrying out approved range improvement practices recommended by the range examiner and approved by the

> county conservation committee. . . . Our question is essentially whether the benefit payments are income to the recipient. . . . ''

By thus phrasing the question, the Tax Court's answer is made to appear a plausible one. It must be pointed out, however, that the problem here cannot be answered by merely calling the amounts ''benefit payments''. *The Soil Conservation and Domestic Allotment Act does not so denominate them.* It simply refers to the payments as ''payments or grants'' of aid. See Section 8 of the Act. When reference is made to the usual meaning of those words, petitioner believes it to be self-evident that these amounts partake more of the nature of subsidies than that of benefits.

For example ''subsidy'' is defined in Webster's New International Dictionary (2nd edition) as follows:

> ''*Subsidy.* 1. aid; assistance; any gift of money or property made by one person to another by way of financial aid. . . . 3. A grant of funds or property from a Government . . . to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public; a subvention.''

''*Benefit*'', on the other hand, is defined by the same authority thus:

> ''*Benefit.* 1. A good deed. 2. Act of kindness; favor conferred; gift; benefaction. 3. Whatever promotes welfare; advantage; profit. 4. Specif. (a) pecuniary advantage or profit.''

It needs little argument to support the contention of petitioner that these payments are more in the nature of a ''grant of funds . . . from a Government . . . to a . . . . company to assist in the establishment or support of an enterprise deemed advantageous to the public'' rather than ''a good deed'' or ''act of kindness.'' Certainly no ''pecuniary advantage or profit'' has accrued to petitioner, since the Tax Court found as a fact that ''the cost of the

work in each year exceeded the amount received by petitioner from the United States." (R. 31) Clearly, these payments were but part of a vast and nation-wide undertaking by the United States Government to induce by subsidization a cooperative effort by farmers and ranchers to save the land of the nation from erosion and ultimate destruction. No clearer case of a subsidy is, or can be, suggested.

It is certainly as clear a case of subsidy as that involved in *Seas Shipping Company, Inc.* v. *Comm.*, 1 T. C. No.7. In that case, the petitioner shipping company entered into an "operating differential subsidy contract" with the United States Maritime Commission under which it was obligated to pay a certain proportion of its earnings into a "capital reserve fund." It was held, pursuant to the Merchant Marine Act of 1936, that the earnings so deposited by the taxpayer during the year 1938 were exempt from income taxes. Due to the provisions of the statute there involved, the holding of the Tax Court is not in point here, but certain portions of its language used in discussing the nature of the subsidy in that case are of assistance in determining the nature of the subsidy made by the Government in this case. The Tax Court says, on page 10 of its opinion, that:

> "By the Merchant Marine Act, as we have seen, Congress was principally concerned in building up a merchant marine. The Act was not primarily for the benefit of the operator. It was for the benefit of the United States. The Congress was interested in having a large and up-to-date merchant marine which could be availed of in case of war or national emergency."

Similarly, in this case, the Congress, by its passage of the Soil Conservation and Domestic Allotment Act, was principally concerned in preventing soil erosion and destruction of the Nation's land resources. That Act was not primarily for the benefit of the "operator"; it was clearly for the benefit of the United States. It was a clear case of subsidization.

Keeping in mind, then, that the payments made to petitioner in this case are subsidies in the purest sense, we proceed to a discussion of *Edwards* v. *Cuba Railroad Company,* 268 U. S. 628 (1925), a decision by the Supreme Court which petitioner contends rules this case in all respects.

III. The payments do not constitute taxable income within the meaning of the Sixteenth Amendment, being mere contributions to the recipient's capital assets.

1. *The Tax Court erred in failing to hold that the principle of Edwards* v. *Cuba Railroad Co., 268 U. S. 628, controls this case, and in omitting to find that no material feature of this case serves to distinguish it from that case.*

With all due respect and deference to the Tax Court, counsel for petitioner feel constrained, after a careful analysis of the Tax Court's opinion, to point out that in this case it has, perhaps unconsciously, refused to follow a decision of the Supreme Court of the United States, which it does not attempt to distinguish.

It is submitted that the principle of *Edwards* v. *Cuba Railroad Co., supra,* is here controlling. While the Tax Court holds such case is not controlling, it makes no attempt to distinguish the facts in the case. The only analysis of the *Cuba Railroad* case appears at page 8 of the opinion (R. 43-44), where it is stated that—

> "The briefs of the parties are largely devoted to a discussion of the rules enunciated by the Supreme Court in *Edwards* v. *Cuba Railroad Co.,* 268 U. S. 628, and its applicability to the stipulated facts. Stated generally, it is that a contribution to the capital assets of a railroad company in order to induce construction and operation of railroads for the service of the public, does not constitute income to the recipient within the meaning of the Sixteenth Amendment. The cited case has been followed many times by the Courts and this Board."

This is followed by a reference to cases where the *Cuba Railroad* case was followed (all of which seem in point), and then by a reference to other cases where the *Cuba Railroad* case was distinguished on the facts (all of which cases are readily distinguished from the facts in this case). However, at no point are the material facts in this case shown to differ from the material facts in the *Cuba Railroad* case. In that case, money subsidies were granted by the Cuban Government to an American railroad company to promote the construction of railroads in Cuba, and in consideration, also, of reduced rates to the public as well as reduced rates and other privileges for the Cuban Government. The subsidies were fixed and paid proportionately to mileage actually constructed, and were used for capital expenditures by the company, although not entered on its books as in reduction of the cost of construction. In holding that the payments could not be taxed as income, the Supreme Court said:

> "The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used. The Cuban laws and contracts are similar to legislation and arrangements for the promotion of railroad construction which have been well known in the United States for more than half a century. Such aids, gifts and grants from the government, subordinate political subdivisions or private sources,—whether of land, other property, credit or money,—in order to induce construction and operation of railroads for the service of the public are not given as mere gratuities. Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 679; Louisville & Nashville R. R. v. United States, 267 U. S. 395. Usually they are given to promote settlement and to provide for the development of the resources in the territory to be served. The things so sought to be attained in the public interest are numerous and varied. There is no support for the view that the Cuban Government gave the subsidy payments, lands, buildings, railroad construction and equipment merely to obtain the specified concessions in respect of rates for government trans-

portation. Other rates were considered. By the first contract, plaintiff agreed to reduce fares for first class passengers and by the second, it agreed to reduce the rates on small produce. Clearly, the value of the lands and other physical property handed over to aid plaintiff in the completion of the railroad from Casilda to Placetas del Sur was not taxable income. These were to be used directly to complete the undertaking. The Commissioner of Internal Revenue in levying the tax did not include their value as income, and defendant does not claim that it was income. *Relying on the contract for partial reimbursement, plaintiff found the money necessary to construct the railroad. The subsidy payments were proportionate to mileage completed; and this indicates a purpose to reimburse plaintiff for capital expenditures.* All—the physical properties and the money subsidies—were given for the same purposes. It cannot reasonably be held that one was contribution to capital assets, and that the other was profit, gain or income. Neither the laws nor the contracts indicate that the money subsidies were to be used for the payment of dividends, interest or anything else properly chargeable to or payable out of earnings or income. *The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment.''* (Italics supplied)

Considering the purposes of the Soil Conservation and Domestic Allotment Act and the uses to which the payments thereunder are to be applied by the recipients, it seems clear that this case is squarely ruled by the Supreme Court's opinion in the *Cuba Railroad* case. Here, as in that case, the payments constitute a ''contribution to capital assets''; and there is a ''purpose to reimburse * * * for capital expenditures.'' Also here, as in that case, there is no indication that the subsidies are ''to be used for the payment of dividends, interest or anything else properly chargeable to or payable out of earnings or income,'' and furthermore, the payments are ''not made for services rendered or to be rendered.''

For purposes of emphasis petitioner believes that the use of a comparative columnar analysis will serve to demonstrate further that the instant case is on all fours with the *Cuba Railroad* case.

*Cuba Railroad Co.**	*Baboquivari Cattle Company*
By an act of its Congress the Cuban government was authorized to contract with one or more railroad companies for construction and operation of certain lines of railroad on designated routes and between places specified by the government.	By an act of Congress the Secretary of Agriculture was authorized to make "payments or grants" of aid to any agricultural producers carrying out approved land preservation practices.
After the completion of one line the Cuban government paid the Cuba R. R. Co. at the rate of $5000 per kilometer in six annual installments. On another line Cuba R. R. Co. received $6000 per kilometer paid in six annual installments as the work progressed.	After the completion of specified and approved conservation practices in 1937, Baboquivari was paid $3,586.89 by the U. S. government, computed on the basis** of the quantities of material furnished and work done. In the year 1938 Baboquivari was paid $3,-247.74 on approval of the specified construction, computed on a similar basis.
In consideration of such reimbursement, Cuba R. R. Co. reduced its rates and accorded other privileges to the Cuban government.	In consideration of such grants the U. S. Government was the recipient of land erosion controls protecting its surrounding land resources.

* The findings of fact by the lower court (Augustus N. Hand, D. J.) should also be examined for completeness. See *Cuba R. R. Co.* v. *Edwards*, 298 Fed. 664 (D. Ct. S. D. N. Y.) (1921).

** In this connection it is to be observed that range building allowances, established upon considerations of size of range, grazing capacity, etc., did not measure the payments to be made, but merely served to apportion the available appropriation and set the maximum sum available to any given ranch. The actual payments were based upon the quantities of materials and work actually furnished; *e. g.*, 15¢ per cubic yard for excavation, 30¢ per rod for fences, etc. (R. 28; Fed. Reg., Vol. 2, No. 38, p. 438)

The amounts paid to Cuba R. R. Co. by the Cuban government did not equal the cost of the specified lines.	The amounts paid to Baboquivari did not equal the cost of the specified land-preservation structures.
Relying on the contract for partial reimbursement, plaintiff found the money necessary to construct the railroad.	Relying on the official designation of the projects for which payment would be made and the statutory provisions for reimbursement, petitioner found the necessary money to construct the projects.
The subsidy payments were proportionate to mileage completed.	The subsidy payments were proportionate to excavation completed, fences constructed, etc.
All payments so made were credited by Cuba R. R. Co. to a suspense account, later transferred to surplus account, and were used for capital expenditures.	The cost of the land improvements made by Baboquivari was not charged to profit and loss, but was treated as a capital item and carried into an asset account.
Nothing in the laws or contracts indicated that the payments might be used for payment of dividends, interest or anything else properly chargeable to or payable out of earnings or income.	There is nothing to indicate that the payments might be used to pay anything properly chargeable to or payable out of earnings or income.

From this comparison of the two cases, it is apparent that no controlling differences between them may be found. In each instance there is present the clear purpose "to reimburse plaintiff for capital expenditures." In this connection, it should be noted that the Tax Court found as a fact that—

> "In petitioner's books of account the cost of the improvements was not charged to profit and loss, but was

> treated as a capital item and carried into an asset account, entitled 'Improvements under Federal Aid.' The amounts received by petitioner in the taxable years were treated as credits to capital surplus." (R. 31-32)

This finding constitutes a clear showing that the payments in question were received, treated and used by petitioner as reimbursement for its capital expenditures.

2. *The principle enunciated by the Supreme Court in Edwards* v. *Cuba Railroad Co., supra, has been followed time and again by the Circuit Courts of Appeals and the Tax Court.*

The doctrine announced by the Supreme Court in the *Cuba Railroad* case has been applied to a variety of cases. For example, in one of the leading cases from the Tax Court on the subject, a group of citizens, in conformity with the statutes of Indiana and Ohio, desiring to obtain electric service, constructed transmission lines and later transferred them to the taxpayer. The latter was required to maintain the lines and furnish electric current to those who had subscribed to the cost of constructing the line, as well as to other subscribers upon payment of the cost of equipment necessary to make connection with the line. The line became the property of the taxpayer-utility, upon being transferred by the constructor. The Tax Court held that the utility derived no income from the transaction. *Liberty Light & Power Company* v. *Commissioner,* 4 B. T. A. 155. See also *Texas and Pacific Railway Co.* v. *United States,* 52 F. (2d) 1040 (Ct. Cls. 1931), aff'd. 286 U. S. 285 (Spur tracks paid for by the users); *Kauai Railway Co.* v. *Commissioner,* 13 B. T. A. 686; *Chicago and Northwestern Railway Co.* v. *Commissioner,* 66 F. (2d) 61 (C. C. A. 7th), cert. den. 290 U. S. 672. Similarly it has been held that donations by municipalities or the members of a community to induce companies to locate their plant or factories at a particular place are not includible in recipient's income. *Holton & Company* v. *Commissioner,* 10 B. T. A. 1317; *Aransas Compress Co.* v. *Commissioner,* 8 B. T. A. 155; G. C. M.

16952, 1937-1 C. B. 133; See, also, *Kell* v. *Commissioner,* 88 F. (2d) 453 (C. C. A. 5th) (1937) and *Detroit Edison Co.* v. *Comm.,* 45 B. T. A. 358, aff'd by Circuit Court of Appeals for the Sixth Circuit, 1942 C. C. H. par. 9778. In Harvey, "Some Indicia of Capital Transfers Under the Federal Income Tax Laws," 37 Mich. L. Rev. 745 (1939), the author correctly summarizes the applicable principles by saying:

> "where money or property has been contributed to a business enterprise by stockholders or others with the intention that these funds are to be used as a part of the permanent capital structure of the company, a capital transfer has occurred out of which no taxable income arises. Similarly, any reimbursement or compensation for capital losses, whether there exists a legal obligaton to pay or not, may also be regarded as a transfer of capital out of which no taxable income arises."

Furthermore, it should be noted that in the instant case it is shown that the amounts paid by petitioner in improving and conserving said lands exceeded the amounts received by it as reimbursements by the United States Government. (R. 28, 31) Consequently, the payments received by petitioner could not be considered as taxable income, for under the classic definition in *Eisner* v. *Macomber,* 252 U. S. 189, income is the *gain* derived from capital, from labor, or from both combined.

It will be observed that the Regulations of the Department of Agriculture (Fed. Reg. Vol. 2, No. 38) do not permit payments under the Soil Conservation and Domestic Allotment Act to be made for improvements on lands owned by the United States. This is because under Sec. 10 of the Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269, as amended by the Act of June 26, 1936, 49 Stat. 1976) a certain percentage of the rent paid under grazing leases is made available "for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements." Such improvements on leased range land are contracted for and paid for by the Government. So far as a Taylor Grazing Act lessee (such as petitioner) is concerned,

the result is the same as in the case of improvements on other lands made under the Soil Conservation and Domestic Allotment Act; in each case the cost is paid for by the Government; in each case the lessee receives some benefit from the range improvements; in each case soil conservation and the general public welfare is promoted. No one would suggest charging a lessee with an income tax on the value of improvements made by the United States on lands leased under the Taylor Grazing Act! Is there any more reason why the same lessee should be charged with an income tax on money received as a reimbursement of expenditures for like improvements on adjacent lands owned or leased by him from a State?

There is still another point. A citizen ought not to be charged with an income tax on money received from the United States in reimbursement of expenditures for rehabilitating lands in respect of which the United States admits responsibility for the conditions which necessitate the rehabilitation work. House Report No. 528 (Appendix "B" hereto) makes it clear that the Government's responsibility for the eroded condition of lands was fully recognized by Congress. It was there said:

> "Over tremendous areas, land destruction has proceeded to the point where it would be impossible to persuade or force the owners to assume the entire burden of control, nor would it be just to do so. Fundamentally, they have not been responsible for the erosion which has occurred. In the disposal of the public domain, settlers were encouraged to acquire the public lands and to cultivate them. With the transfer of ownership went no restrictions, instructions, or advice as to methods under which the land should be used in order to protect it from erosion.
>
> Acting in good faith, the settlers used their land in the light of the best information available. Since it was not the initial fault of the settler that his land became subject to erosion, it would not be right to require him to bear the entire burden of repairing damage done or of preventing future damage. Furthermore, the inter-

est of the Nation in controlling erosion far exceeds that of the private landowner."

3. *No case cited by the Tax Court serves to invalidate the contentions of petitioner in this case.*

The line of cases cited by the Tax Court as indicating that the doctrine of *Edwards* v. *Cuba Railroad Co.* has been "sparingly applied" may indeed indicate that fact, but none go so far as to hold that such doctrine does not apply where the material facts are the same. They do not indicate that the doctrine should not be applied here. On the contrary, it is petitioner's belief that those very cases have served to clarify the position of the Supreme Court in the *Cuba Railroad* case to such an extent that *they make it all the more apparent* why the instant case falls within the rule.

For example, in the case of *Texas and Pacific Ry. Co.* v. *U. S.*, 72 Ct. Cls. 629, 52 F. (2d) 1040, aff'd 286 U. S. 285, there is present a factual situation ideally suited to the necessary distinction. The *Cuba Railroad* rule was applied as to one angle of the case and denied as to another.

(a) The railroad, at the request of and for the benefit of, various persons along its right of way had constructed spur tracks, side tracks, culverts, etc. For all of this expenditure, the railroad was reimbursed by the persons so requesting and benefiting by the same. The Court of Claims found no difficulty in applying the rule contended for by petitioner in the present case and held the amounts so paid not to be income.

(b) Under another phase of the case, however, the railroad company contested the taxability of certain "guaranty payments" made to it by the U. S. Government under the provisions of Sec. 209 of the Transportation Act of 1920, 41 Stat. 464; 49 U. S. C. A. Sec. 77. Under the terms of that Act the United States guaranteed that, with respect to any carrier accepting the provisions of the Act, the "railway *operating income* of

such carrier for the guaranty period as a whole shall not be less'' than certain determined amounts. If the carrier's operating income fell below the determined figure, the Government paid the difference to the carrier. The railroad had accepted the terms of the Act and had received such payments from the Government in the sum of $2,043,041.77. These payments were made in order to bring the railroad's *operating income* to the specified figure. They were, as the Government contended, payments ''derived because of the operation of a railroad and consequently come within the definition of income as 'gain derived from capital, from labor, or from both combined.' '' See statement of Government's position, 285 U. S. 287. The Court of Claims so held, being unable to overlook ''the fact that it was *railway operating income* which was guaranteed and made up.'' 52 F. (2d) 1044. The railroad's contention that the *Cuba Railroad* case should be controlling was correctly overruled since these payments could in no sense be considered a reimbursement of capital expenditures or as a contribution to capital. Nor could the payments be considered a gift, since the railroad had also obligated itself under the terms of the Act to pay *to the Government* any excess over a specified operating income. The Supreme Court affirmed on this point, saying at page 289 of 286 U. S.:

''The purpose of the guaranty provision was to stabilize the credit position of the roads by assuring them a minimum operating income. They were bound to operate their properties in order to avail themselves of the Government's proffer. Under the terms of the statute *no sum could be received save as a result of operation.* If the fruits of the employment of a road's capital and labor should fall below a fixed minimum then the Government agreed to make up the deficiency, and if the income were to exceed that minimum the carrier bound itself to pay the excess into the federal treasury. In the latter event the carrier unquestionably would have been obligated to pay income tax measured by ac-

tual earnings; in the former, it ought not to be in a better position than if it had earned the specified minimum. *Clearly, then, the amount paid to bring the yield from operation up to the required minimum was as much income from operation as were the railroad's receipts from fares and charges.''* (Italics supplied)

The cases of *Continental Tie and Lumber Co.* v. *United States,* 286 U. S. 290, and *Gulf Mobile & Northern Railroad Co.,* 22 B. T. A. 233, aff'd 293 U. S. 295, involve the identical question disposed of in the *Texas & Pacific Ry. Co.,* case, *supra,* and were decided in the same way on the same grounds.

Thus, it is clear that these three cases have no bearing on the instant case. They involve contributions by the sovereign to the income of the taxpayer; the payments were in effect but a substitution for the railroad's receipts from fares and like charges. Naturally such payments must be considered as income.

In the present case, the situation is entirely different. The payments received from the Government have no relation whatever to the operating income of the petitioner. There was no attempt or purpose on the part of the Government to maintain the ranch's income at a specified figure. As in the *Cuba Railroad* case, the payments were purely and simply a reimbursement for capital expenditures made by petitioner. The construction work done by petitioner in respect of which the payments were made was undoubtedly a capital improvement. Indeed petitioner does not understand that there is any contention to the contrary in this regard.

In the case of *Kansas City Southern Ry. Co.* v. *Commissioner,* 52 F. (2d) 372, cert. den. 284 U. S. 676, the Commissioner contended that the amounts paid to railroads as just compensation for the use of their properties during the period of Federal control was taxable income. The court upheld the contention. Again it is submitted that such a holding has no bearing on the instant case. The payments by the Government were no more than a substitution for the

customary *income* which the railroad would have received in performing its services as a carrier had it not been taken over by the Government for temporary use. Such payment for use was income just as much so as if rental had been paid for the use of the road by a private concern under lease. No capital assets were taken, nor was there a reimbursement for capital expenditures as there clearly was here.

In *Burke-Divide Oil Co.* v. *Neal,* 73 Fed. (2d) 857, a boundary dispute had occurred between Texas and Oklahoma as to which state included within its borders certain oil and gas claims. These claims had been located in good faith by the taxpayer in the bed of the Red River, the boundary line of the two states. The Supreme Court took jurisdiction of the dispute and appointed a receiver who took possession of the wells which had been located by the taxpayer, and under order of court *operated the properties and impounded the proceeds.* The dispute was settled in favor of the United States which had intervened, and an Act of Congress was passed to adjust the equitable claims of the locators. Under authority of said Act the Secretary of Interior paid to the taxpayer its share of the receiver's *operating income* attributable to the properties located by taxpayer. Clearly, such sums were income, and it was so held; but again there seems to be no relation between such a situation and this case, involving, as it does, the question of capital reimbursement.

The case of *Obispo Oil Co.* v. *Welch,* 85 F. (2d) 860, on this point merely follows the *Burke Divide Oil Co.* case, *supra.*

Marine Transport Co. v. *Commissioner,* 77 F. (2d) 177, contains nothing in opposition to petitioner's contentions in this case. There the taxpayer's schooner and cargo had been destroyed by a German submarine. In its 1917 return taxpayer took and was allowed a deduction for the full value thereof. In 1928, however, the Mixed Claims Commission awarded the taxpayer the full market value of the schooner and cargo, and taxpayer claimed that the amount so received

did not constitute income to it. It was held, however, that the sum so received was includible in full in its 1928 return. The holding was based on the recognized principle that what one receives for his property, in excess of its cost, is income, and that since taxpayer had recovered the cost of the schooner and cargo by the deduction taken in 1917, the amount received in 1928 must be deemed income. In the instant case, however, petitioner was not even reimbursed the amount of its cost in building the desired projects. Thus the *Marine Transport* case hardly seems applicable even by analogy.

The case of *Helvering* v. *Claiborne-Annapolis Ferry Co.*, 93 F. (2d) 875, resembles the *Texas & Pacific Ry. Co.* case, *supra.* The monthly payments made by the State of Maryland to the ferry company were paid by the state in consideration of the *maintenance* of the ferry, and, in the words of the court, "was as truly earned by the operation of that enterprise as were the tolls collected from vehicles and passengers." It certainly cannot be said that the payments made to petitioner by the U. S. Government were as truly earned in the operation of the ranch as were the amounts received by it from sales of its livestock. Unlike the present case, the ferry company used the money paid to it by the State for operating expenses and the accumulation of a dividend fund, just as it did with all other income. The amounts were thus clearly income as distinguished from the contribution to capital made in this case.

The last case cited by the Tax Court on this angle of the case is *Lykes Bros. S. S. Co.* v. *Commissioner,* 126 F. (2d) 725. In that case the steamship company received sums from the United States under a mail carriage contract. The payments were held to be income. Clearly the sums received for carrying mail were just as much income to the steamship company as the sums received by it for carrying passengers or other cargo. An analogous situation could be imagined in the present case. Suppose, for example, petitioner had been under contract with the U. S. Government to raise and deliver to it 1000 head of cattle. The

sum paid for the cattle admittedly would be income just as much so as amounts received from the sale to petitioner's regular customers. This hypothetical case, of course, differs widely from the actual facts. In reality all that petitioner did was to build a series of capital structures. For its expenditures so made it was reimbursed by the Government.

The Tax Court also appears to have overlooked the fact that the Government, at its own direct expense, has gone forward for many years with a program of range improvements with the object of range building and erosion control. Suppose the Department of Interior had erected the same water tanks, etc., on petitioner's lands, under its appropriation for range building or erosion control.* Would the Tax Court hold that the value of such improvements constituted income to petitioner? Or suppose the structures were erected by the Civilian Conservation Corps (as has been the case in some instances). Would the value of such structures be income to petitioner? What difference, in principle, can it make whether range building projects erected on private or leased lands are carried out by public agencies, or, as in this case, are simply induced or brought about by a payment to the land owner or lessee to reimburse him for the cost of such projects?

4. *It was error to hold that the payments here involved are taxable on the assumption that wholly different classes of payments under the same act may be taxable.*

In discussing the status of the payments made to the petitioner in this case, the Tax Court cites *Salvage* v. *Commissioner*, 76 Fed. (2d) 112 (C. C. A., 2d) (1935), as a case to be compared with the present one. That case involved the question of the correct cost basis to be used in the computation of gain on the sale of certain stock, which had been acquired by the taxpayer from the issuing corporation under a contract (1) that the issuing corporation

*See Secs. 2 and 10 of Taylor Grazing Act, as amended, Act of June 29, 1934 (48 Stat. 1269), Title 43, Secs. 315a and 315i, U. S. C. A.

should have an option to repurchase specified amounts of the stock at specified intervals and (2) that the taxpayer would not engage at any time throughout his life in any competing business without the corporation's consent. It is difficult to see how that case can even be compared with the present one, unless it be assumed that the Tax Court intended to derive some comfort from the following statement made by the Court in the course of its opinion:

> "The contract under which the petitioner purchased the 1500 shares of Viscose stock stated that the consideration for selling it at less than its real value was the petitioner's covenant relating to the option and to his refraining from engaging in any competing business. Compensation paid for refraining from labor would seem to be taxable income no less than compensation for services to be performed. *For example, a farmer who is paid for voluntarily refraining from raising hogs receives, in our opinion, income.* Certainly, it is neither a capital payment nor a gift." (Itailes supplied.)

It may well be that the *obiter* expression of opinion by the Circuit Court, above quoted, to the effect that a farmer who is paid for voluntarily refraining from raising hogs receives income, caused the Tax Court to fall into the error of holding that the payments here involved are taxable income. It cannot be too strongly emphasized that this case is solely concerned with one class of payments under the Soil Conservation and Domestic Allotment Act. Whether other classes of payments are taxable is not involved and can have no bearing on the issue in this case. Only a few lines before its citation of the *Salvage* case, the Tax Court states that the payments in question—

> "were made under the same law and regulation that payments were made for refraining from raising cotton, or sugar beets, for devoting a portion of the acreage to the raising of leguminous crops, taking steps to eradicate rodents and noxious weeds, furrowing on the contour, withholding land from grazing, or following out other approved practices for building up the soil and preventing erosion."

However, there is no attempt to follow up this statement by a showing that the payments to the petitioner were in the same class as those referred to in the quotation. Clearly, they were not. The construction of reservoirs, dams, fences, and the digging of wells is obviously construction of a capital nature. It is needless to cite authority to the effect that the sale or exchange of such type of construction would fall within the provisions of the taxing statutes relating to gain or loss on the sale or exchange of "capital assets." See Sec. 117(a), I. R. C.; *Detroit Edison Co.* v. *Comm., supra.* Clearly, there is no relation between such activity and that type referred to in the Tax Court's quotation set forth above. Nothing in this case calls for a decision as to the taxability of such other classes of payments. Some or all of them may be taxable. Perhaps payments made as a substitute for normal *income* or to offset loss of *income,* resulting from compliance with the Government's wishes as to what crops to plant, or as to operating practices, could be construed to be taxable income, on some such theory as that applied in *Helvering* v. *Claiborne-Annapolis Ferry Company, supra,* where payments were held to be taxable, since they related to "the operation of the enterprise." The present case, however, must be decided on its own facts and without regard to how other classes of payments made under the same act should be treated for tax purposes.

IV. It was error to support the Tax Court's conclusion by considering the effect of an uncontested depreciation deduction in respect of the range improvements.

This case raises no issue as to petitioner's right to depreciation on the range improvements, and the decision here should not be influenced by what may or may not have been a correct allowance of depreciation in respect thereto. See *Detroit Edison Co.* v. *Comm., supra.*

At page 11 of the opinion the Tax Court attempts to bolster up its decision by referring to the fact that depreciation has been claimed and allowed on the investment in the

range projects here in question. The problem here is the single one of determining the taxable character of the payments. What depreciation is allowable is an issue entirely separate and to be decided, when properly raised, in the light of the final answer in the instant proceeding.*

V. The grants may be construed to be gifts to petitioner, and therefore exempt from taxation under Sec. 22(b)(3).

Sec. 22(b)(3) specifically excludes from gross income and exempts from taxation—

"the value of property acquired by gift."

Considering the provisions of the statutes authorizing the grants, it may be argued that they should be construed as gifts to the recipient. Sec. 7(a) of the Soil Conservation and Domestic Allotment Act provides that the powers of the Secretary "shall be used to assist *voluntary* action calculated to effectuate the purposes specified in this section." Sec. 8 (a) provides that in carrying out the provisions of the Act the Secretary "shall not have power to enter into any contract binding upon any producer or to acquire any land or any right or interest therein." This section also speaks of "payments or grants."

United States v. *Hurst*, 2 F. (2d) 73, lends support to this theory. That was a suit by the United States to recover an income tax in respect of the price received by the taxpayer upon the sale of certain petroleum mineral rights, which rights had been secured from the United States pursuant to the mineral laws. The court held that the grant of such rights by the Government to the taxpayer constituted a non-taxable gift. In so holding the court said:

---

* At page 11 the Tax Court apparently inadvertently states, "If the amounts received from the Government are not included in income, it, in effect, will have a double deduction". No issue of a *deduction* from income is here involved. The sole issue is whether the payments are *includible* in taxable gross income. Depreciation is allowed in respect of property acquired by gift [I. R. C., Secs. 114(a), 113(b) and 113(a)(2)], but nonetheless gifts are not thereby established to be income; and no double deduction results from excluding gifts from income and at the same time allowing depreciation thereon.

> "Reward in some form or other is frequently the basis of a gift, as in the case of Barnes v. Poirier, supra, the court recognized the grant to be in the nature of a gift to old soldiers as compensation for past services to their government. If there could be a reward offered to old soldiers for past services to the government, upon the same theory why cannot a reward be offered to a discoverer of mineral deposits? *The result of the endeavor in each case is a benefit to the nation.*" (Italics supplied.)

Just so in the case at bar, "the result of the endeavor," under the range conservation programs is a lasting "benefit to the nation," and the Government's reimbursements therefor may well be considered as in the nature of a nontaxable gift. Cf. *Obispo Oil Co.* v. *Welch, supra,* in which this Court interpreted the *Cuba Railroad* case as being "an example of a pure gift."

CONCLUSION.

For the reasons heretofore stated, the payments or grants received by petitioner in 1937 and 1938 from the United States, pursuant to the Soil Conservation and Domestic Allotment Act, do not constitute taxable income. The decision of the Tax Court should be reversed and the case remanded with directions to the Court below to redetermine petitioner's taxes for said years by excluding the amounts of said payments or grants from net income.

Respectfully submitted,

JOHN W. TOWNSEND,
LLOYD FLETCHER, JR.,
National Press Building,
Washington, D. C.

RALPH W. BILBY,
T. K. SHOENHAIR,
Valley National Bank Building,
Tucson, Arizona,

Attorneys for Petitioner.

APPENDIX "A"

EXCERPTS FROM THE SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT, AS AMENDED.

The Act of April 27, 1935, Public No. 46—74th Congress (49 Stat. 163) provides in part as follows—

"AN ACT

To provide for the protection of land resources against soil erosion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it is hereby recognized that the wastage of soil and moisture resources on farm, grazing, and forest lands of the Nation, resulting from soil erosion, is a menace to the national welfare and that it is hereby declared to be the policy of Congress to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, and maintain the navigability of rivers and harbors, protect public health, public lands and relieve unemployment, and the Secretary of Agriculture, from now on, shall coordinate and direct all activities with relation to soil erosion and in order to effectuate this policy is hereby authorized, from time to time—

* * * * * * * * *

(3) To cooperate or enter into agreements with, or to furnish financial or other aid to, any agency, governmental or otherwise, or any person, subject to such conditions as he may deem necessary, for the purposes of this Act; and * * *."

The Act of February 29, 1936, Public No. 461—74th Congress (49 Stat. 1151) added ten new sections to the Act approved April 27, 1935, including the following provisions—

"Sec. 7. (a) It is hereby declared to be the policy of this Act also to secure, and the purposes of this Act shall also include, (1) preservation and improvements

of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources; (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control; and (5) reestablishment, at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the general public interest, of the ratio between the purchasing power of the net income per person on farms and that of the income per person not on farms that prevailed during the five-year period August 1909-July 1914, inclusive, as determined from statistics available in the United States Department of Agriculture, and the maintenance of such ratio. The powers conferred under sections 7 to 14, inclusive, of this Act shall be used to assist voluntary action calculated to effectuate the purposes specified in this section.

* * * * * * * * *

Sec. 8.

* * * * * * * * *

(b) Subject to the limitations provided in subsection (a) of this section, the Secretary shall have power to carry out the purposes specified in clauses (1), (2), (3), and (4) of section 7 (a) by making payments or grants of other aid to agricultural producers, including tenants and share-croppers, in amounts, determined by the Secretary to be fair and reasonable in connection with the effectuation of such purposes during the year with respect to which such payments or grants are made, and measured by, (1) their treatment or use of their land, or a part thereof, for soil restoration, soil conservation, or the prevention of erosion, (2) changes in the use of their land, * * * In determining the amount of any payment or grant measured by (1) or (2) the Secretary shall take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which such payment is made. * * * In carrying out the provisions of this section, the Secretary shall not have power to enter into any contract binding upon any producer or to acquire any land or any right or

interest therein. In carrying out the provisions of this section, the Secretary shall, in every practicable manner, protect the interests of small producers. The Secretary in administering this section shall in every practical way encourage and provide for soil conserving and soil rebuilding practices rather than the growing of soil depleting commercial crops.

(c) Any payment or grant of aid made under subsection (b) shall be conditioned upon the utilization of the land, with respect to which such payment is made, in conformity with farming practices which the Secretary finds tend to effectuate the purposes specified in clause (1), (2), (3), or (4) of section 7(a)."

APPENDIX "B"

Legislative History of the Soil Conservation and Domestic Allotment Act, As Amended

The Act of April 27, 1935 was originally introduced as H. R. 7054. House Report No. 528, 74th Congress, 1st Session, to accompany H. R. 7054 explained the general purpose of the Bill as follows:

"Explanation of the Bill

The preamble, section 1, sets forth the objectives of the bill, outlines the basis for a Federal policy of erosion control, and provides that the Secretary of Agriculture shall direct and coordinate all Federal activities with relation to soil erosion. Unless soil erosion can be controlled on farm, grazing, and forest lands, the prosperity of the United States cannot be permanently maintained. Control of erosion is essential to prevent the wastage of soil, conserve water, control floods, prevent the silting of reservoirs, maintain the navigability of rivers and harbors, protect public lands, and to keep from Federal relief rolls the populations of regions threatened with abandonment. These aspects of the problem justify Federal responsibility for the carrying out a national erosion control program.

* * * * * * * * *

Subsection (3) of section I authorizes agreements with, and financial or other aid to, any agency or any person, insofar as may be required for the purpose of

controlling erosion. The agreements or aid would be subject to such conditions as may be deemed necessary and as are authorized by the act.

The aid authorized in this subsection will be necessary because, in general, the owner of private lands cannot bear the entire cost of controlling the erosion thereon. He has neither the technical knowledge nor the financial resources. Over tremendous areas, land destruction has proceeded to the point where it would be impossible to persuade or force the owners to assume the entire burden of control, nor would it be just to do so. Fundamentally, they have not been responsible for the erosion which has occurred. In the disposal of the public domain, settlers were encouraged to acquire the public lands and to cultivate them. With the transfer of ownership went no restrictions, instructions, or advice as to methods under which the land should be used in order to protect it from erosion.

Acting in good faith, the settlers used their land in the light of the best information available. Since it was not the initial fault of the settler that his land became subject to erosion, it would not be right to require him to bear the entire burden of repairing damage done or of preventing future damage. Furthermore, the interest of the Nation in controlling erosion far exceeds that of the private landowner. An individual may destroy his land, move away, obtain a position somewhere else, accumulate capital, and purchase new land. For the Nation, land destroyed is land gone forever. This drain on the national resource is not immediately fatal, but, if the destruction continues unchecked, the time will come when remaining land resources will be insufficient to support our population on an adequate standard of living. The cost to the Nation of such changes would be incalculable. Moreover, erosion directly threatens vast Federal investments in dams and channels and annually requires the expenditure of large sums for dredging operations. The only practical method of eliminating these hazards and costs is to control the erosion on private lands, and it would not be equitable to require the owner of these lands to make expenditures for the protection of Federal investments."

Senate Report No. 466, 74th Congress, 1st Session, to accompany H. R. 7054, explained the general purposes of the Bill, as follows:

"Explanation of the Bill.

Recognizing that, unless soil erosion can be controlled on farm, grazing, and forest lands, the prosperity of the United States cannot be permanently maintained, the bill provides for the coordination of all Federal activities with relation to soil erosion.

Heretofore, soil-erosion control has been among several groups in the different Departments. The present bill coordinates all of these groups and places the control under the Secretary of Agriculture. Experiences of recent storms, both flood and wind, demonstrate the necessity to prevent wastage of soil, the conservation of water, and the control of floods. The silting of reservoirs, the maintaining of the navigability of rivers and harbors, the protection of public lands, all justify Federal responsibility for the carrying out of a national erosion-control program."

The Senate Report then set forth almost verbatim the above explanatory provisions set forth in House Report No. 528.

The amendments to the Act of April 27, 1935 which were finally enacted in the Act of February 29, 1936, were first considered in the House of Representatives in connection with H. R. 10835, 74th Congress, 2nd Session. House Report No. 1973, 74th Congress, 2nd Session, to accompany H. R. 10835 and entitled "Soil Conservation Act" states:

"The bill recognizes that the agricultural problem is one demanding national attention. No one can doubt that the prosperity of our vast farming population is a matter of national concern. Nor can it be questioned that the depletion of our soil resources is a menace to our present and future well-being as a nation. If means can be found to rehabilitate the agricultural industry by methods not in conflict with the Constitution the national welfare will be promoted. This bill proposes to meet the agricultural problem by the exercise of Federal powers, in conformity with the Constitution, through provision for conserving our soil resources and for making proper utilization of them.

The methods proposed by the bill to accomplish its purpose are twofold. First, the bill provides for grants to States to enable them to carry out their own programs for agriculture rehabilitation. Second, the bill provides for conditional noncoercive payments by the Federal Government to farmers to encourage proper utilization of their soil until such time as State action can become operative.

Necessity for Soil Conservation

We have been forced in recent years to regard the rapid depletion of our soil as a menace to national welfare. * * * The consequences in exhaustion of our soil resources have not been so readily apparent. But the recent dust storms and the presence of large areas of eroded lands point to the desirability, from an immediate as well as a long-range point of view, of the national objective of saving our land. The necessity for such a policy was set forth by the President in his message to Congress of June 8, 1934 (H. Doc. 397, 73d Cong., 2d sess.), in which he stated:

> 'The extent of the usefulness of our great natural inheritance of land and water depends on our mastery of it. We are now so organized that science and invention have given us the means of more extensive and effective attacks upon the problems of nature than ever before. We have learned to utilize water power, to reclaim deserts, to re-create forests and to redirect the flow of population. Until recently we have proceeded almost at random, making many mistakes.
>
> There are many illustrations of the necessity for such planning. Some sections of the Northwest and Southwest, which formerly existed as grazing land, were spread over with a fair crop of grass. On this land the water table lay a dozen or 20 feet below the surface, and newly arrived settlers put this land under the plow. Wheat was grown by dry-farming methods. But in many of these places today the water table under the land has dropped to 50 or 60 feet below the surface and the top soil in dry seasons is blown away like driven snow. Falling rain, in the absence of grass roots, filters through the soil, runs off the surface, or is quickly reabsorbed into the at-

mosphere. Many million acres of such land must be restored to grass or trees if we are to prevent a new and man-made Sahara.

At the other extreme, there are regions originally arid, which have been generously irrigated by human engineering. But in some of these places the hungry soil has not only absorbed the water necessary to produce magnificent crops, but so much more water that the water table has now risen to the point of saturation, thereby threatening the future crops upon which many families depend. (Page 3.)'

The Department of Agriculture estimated in 1934 that 50,000,000 acres of farm land had been destroyed because the soil had been allowed to wash away, and that another 50,000,000 acres were in almost equally bad condition. The Department further estimated that an additional 100,000,000 acres of land had been seriously impaired by erosion and that erosion had begun upon still another 100,000,000 acres. Studies have indicated that deterioration threatens the great bulk of 360,000,000 acres of cultivated lands in the United States, and if permitted to continue unchecked will lead to a steady increase in costs of production of foods and fibers on American farms, with consequent increased outlays by consumers for farm products and reduced net incomes to producers. Studies also show that such deterioration of national soil resources could be prevented by the general adoption of appropriate farming practices and that the cost of general adoption of such practices would be small compared with the cost of efforts to correct the results of failure to do so.

This bill proposes to encourage the adoption of such practices and thereby promote the general welfare in a fundamentally national sense by removing impediments to the preservation of the quality of the national soil resources, * * *.

* * * * * * * * *

Federal Payments to Farmers for Land Conservation

The bill also adds a new section (sec. 8) to the Soil Erosion Act. This section is temporary in its operation. By its terms the Secretary of Agriculture is

given power to make payments or other grants of aid to agricultural producers to encourage farming practices designed to result in (1) preservation and improvement of soil fertility, (2) promotion of the economic use of land, and (3) diminution of exploitation and unprofitable use of national soil resources. He is given no independent power, under the temporary plan, to provide for a continuous and stable supply of agricultural commodities or to provide for reestablishing and maintaining farm purchasing power. Such payments or grants are to be conditioned upon such utilization of land as the Secretary finds has tended to accomplish the purposes enumerated above. The amount to be paid to each producer for carrying out soil-conservation practices is to be based upon the treatment or use of land for soil restoration, soil conservation, or the prevention of erosion, as the case may be; changes in the use of land; or a domestic allotment percentage. The Secretary is to take into consideration the productivity of the land affected in making any payment based upon land use.

The Secretary is expressly denied the power to enter into contracts binding any producer to any course of action or to acquire any land or right or interest in land uder the bill.

* * * * * * * * *

Under the temporary plan, each producer is completely free to do as he pleases with his farm. There is no coercion upon him to change his practices, to adopt any particular practice, or to fail to adopt any practice. Not only has the farmer freedom of choice, but the Secretary of Agriculture is expressly forbidden to bind him in any choice. The Secretary is expressly prohibited from entering into any contract binding upon a producer or to acquire any land of the producer or any right or interest in the land of the producer. No obligation is to be assumed by the farmer as consideration for any payment or grant of aid. No requirement is imposed upon a farmer, even if he wants to have it imposed upon him, to enter upon any course of action, and no civil or penal consequences are enforceable with respect to him out of his failure to act or his having acted in any way. Thus, as a direct exercise of Federal power the temporary plan is wholly within the Constitution under the Butler decision."

The Bill as introduced in the Senate was known as S. 3780, 74th Congress, 2nd Session. Senate Report No. 1481, 74th Congress, 2nd Session to accompany S. 3780, entitled "Conservation and Utilization of the Soil Resources" stated:

> "The stated purpose of the pending bill is entirely different from that contained in the Agricultural Adjustment Administration Act. The provisions of the bill are entirely different. No contracts to comply with Federal regulations or contracts of any sort are provided for. The conservation of natural resources, the fertility of agricultural lands, and soil building are the declared purposes of the pending bill. No tax is levied by the bill. The fact that prevailing farm practices are depleting soil fertility and will, if continued, ultimately endanger a steady supply of necessary foods and raw material for clothing is a matter of common knowledge. The fact that such practices will continue to increase the cost of production and, therefore, the prices to be paid by the people is a matter of national interest. Economic production of agricultural products is a matter which directly affects the price paid by all consumers and is one that directly affects the general welfare.
>
> The bill proposes to amend Public No. 46, Seventy-fourth Congress, which made provisions for prevention of erosion, by bringing within its policy and purposes, the improvement and preservation of national soil resoures. It expresses a purpose to effect this result through encouragement of the use of these resources in such manner as to preserve and improve fertility, promote economic use, and diminish the exploitation and unprofitable use of national soil resources.
>
> * * * * * * * * *
>
> Thus the bill lays out a plan for an ordered program designed to encourage sound soil-conservation practices without thereby diminishing farmers' incomes or causing undue curtailment of supplies of agricultural commodities.
>
> * * * * * * * * *

In Conference Report No. 2079, 74th Congress, 2nd Session, to accompany S. 3780, the report being entitled "Soil Conservation and Domestic Allotment Act", there is further discussion of minor changes made in the bill as originally introduced in order to more clearly and fully set forth the purposes of the legislation.

No. 10292

In the United States Circuit Court of Appeals for the Ninth Circuit

BABOQUIVARI CATTLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10292

BABOQUIVARI CATTLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 29–50) which is reported in 47 B. T. A. 129.

JURISDICTION

This petition for review (R. 51–57) involves federal income taxes for the years 1937 and 1938 in the respective ~~about~~ amounts of $795.60 and $424.46 On April 20, 1940, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $1,220.06. (R. 11–17.) Within ninety days thereafter and on July 18, 1940 (R. 1), the taxpayer filed a petition with the Board of Tax Appeals for a re-

determination of that deficiency under the provisions of Section 272 of the Internal Revenue Code (R. 4–11). The decision of the Board of Tax Appeals sustaining the respective deficiencies was entered June 16, 1942. (R. 50.) The case is brought to this Court by a petition for review filed September 14, 1942 (R. 51–57), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. As of October 22, 1942, by Section 504 of the Revenue Act of 1942, the name of the Board of Tax Appeals was changed to The Tax Court of the United States. Although the decision of the Board and the petition for review were both filed prior to that date, since the record was printed subsequent thereto by the clerk of this Court he captioned the record a "Petition for Review of Decision of The Tax Court of the United States".

QUESTION PRESENTED

Whether benefit payments made to the taxpayer corporation by the Federal Government at the end of each year for complying with established range-improvement practices constituted taxable income under the broad provisions of Section 22 (a) of the Revenue Acts of 1936 and 1938.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever

form paid, or from professions, vocations trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

(The corresponding provisions of the Revenue Act of 1938 c. 289, 52 Stat. 447, are the same.)

STATEMENT

Taxpayer, an Arizona corporation engaged in the operation of a cattle ranch and keeping its books upon the accrual basis, filed its returns with the Collector of Internal Revenue for the District of Arizona. The ranch comprises 57,200 acres of land in Pima County, Arizona, 45,880+ being owned by the state, 4,000 by the United States and 7,319+ by taxpayer. During the taxable years, the land owned by the state was held by taxpayer under grazing leases duly executed under the laws of Arizona for terms of from five to ten years and the land owned by the United States

was held by taxpayer under the provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended. The land is in a hot, semiarid region in the watershed of the Gila River, a tributary of the Colorado River. The major portion of the rainfall occurs during three summer months and because of climatic and geographical conditions, the lands owned or held by taxpayer and surrounding lands are subject to substantial erosion. (R. 29–30.)

During the taxable years, taxpayers constructed or rebuilt on the ranch some dirt reservoirs and earthern tanks, constructed a rubble masonry dam, built two miles of drift fence, deepened a well, and developed a spring or seep. Before these improvements were undertaken, a range grazing examiner, working in conjunction with the Pima County Range Censervation Committee, had made a survey of taxpayer's ranch and a report recommending that the improvements be made. The first report was approved by the committee on or about July 16, 1937. On that date, the committee advised taxpayer in writing (R. 30–31):

> Upon notification by you * * * that one or more of these recommended improvements have been completed, the County Committee will inspect same and upon approval, will submit to you an application to be signed for benefit payment.

The letter also advised taxpayer, in accordance with the Soil Conservation and Domestic Allotment Act, c. 85, 49 Stat. 163, as amended, and the regulations

issued thereunder: "Number of animal units 2325 which times $1.50 per head, will enable you to earn a maximum payment of $3,487.50." Substantially the same procedure was followed in 1938, the total allowance, computed upon the number of acres and number of animal units, being $3,247.74. (R. 31.)

Upon completion of a portion of the work in 1937, the contemplated notification was given, application was filed and approved, and payment was authorized and made to taxpayer in the amount of $3,586.89. Upon completion of the remainder of the work in 1938, payment was made in the amount of $3,247.74. The cost of the work in each year exceeded the amounts received by taxpayer from the United States. In taxpayer's books of account, the cost of the improvements was not charged to profit and loss, but was treated as a capital item and carried into an asset account entitled "Improvements under Federal Aid". The amounts received by taxpayer in the taxable years were treated as credits to capital surplus. In its returns of income, the amounts were shown as carried upon taxpayer's books, but neither was included in its gross income. The Commissioner added each of them to the net income reported. (R. 31–32.) The Board of Tax Appeals sustained this action. (R. 50.)

SUMMARY OF ARGUMENT

The benefit payments made to the taxpayer corporation by the Federal Government were in consideration of compliance throughout the tax years in question with established range-improvement practices. Such payments fall within the general concept

of income, and since Congress, in providing for their payment, granted no exemption as it did in other situations, exemption cannot be presumed. The Board of Tax Appeals properly concluded that such payments must be returned as income.

ARGUMENT

The Board of Tax Appeals properly concluded that benefit payments made to the taxpayer corporation by the Federal Government for complying with established range-improvement practices, constituted taxable income

While we do not intend in any way to challenge the wisdom of benefit payments on the part of the Federal Government, it appears pertinent to observe, at the outset, that it seems strange if not startling to see a taxpayer corporation which is annually enjoying large benefit payments come into court and ask to be relieved of paying the same rate of income tax on them which less fortunately situated citizens are required generally to pay on regularly earned income. Periodically, lists are published showing the many thousands of dollars paid under farm benefits to large corporations, principally land holding insurance and mortgage companies. It seems almost catastrophic to even contemplate exemption of such payments from income tax. It has been the consistent position of the Bureau of Internal Revenue that such payments constitute income. I. T. 2992, XV–2 Cum. Bull. 75 (1936); I. T. 3379, 1940–1 Cum. Bull. 16. The fact that the instant case is the first one of its type seems indicative of the general acceptance by taxpayers of the administrative ruling.

It should be noted that Section 22 (a) of the Revenue Act of 1936, *supra,* is about as comprehensive as

language permits, and that Congress plainly intended to reach gains and profits of every description. *Irwin* v. *Gavit,* 268 U. S. 161. Here, under the test laid down in *Eisner* v. *Macomber,* 252 U. S. 189, the gain is coming in, being derived, or proceeding from the capital and labor of the taxpayer and, accordingly, falls within the generally accepted definition of income.

Since the benefit payments here undoubtedly fall within the broad concept of income, it is incumbent upon the taxpayer to show that they fall within one of the exemption classes. It is fundamental in tax law that exemptions are to be narrowly construed. Congress made provision for the benefit payments here while the income tax laws were in full force and effect. Since Congress did not see fit to incorporate in the Act a provision exempting benefit payments from the usual income tax, the conclusion that it intended them to be taxed seems inescapable. See *United States* v. *Stewart,* 311 U. S. 60.

The situation involved in *Seas Shipping Co.* v. *Commissioner*, 1 T. C. No. 7, referred to by the taxpayer (Br. 14), lends definite support to the Government's position here. The payment there made to the taxpayer was not exempt merely because it was a subsidy, but because its general use was withheld from the taxpayer and Congress specifically said that to the extent of the payments so withheld, no federal tax should be imposed. Congress specifically provided, however, in the same section that if and when the payments were withdrawn from the special re-

serve fund, they should be taxed. That statute was enacted in 1936, at about the same time as the statute providing for the benefit payments in the instant case. The fact that Congress included a limited exemption in the one statute and failed to make any such provision in the latter statute, indicates that such payments were generally contemplated as falling within the taxable income category.

The taxpayer argues (Br. 12–15) that the payments here were subsidies and draws the conclusion that they, accordingly, fell outside the income category, as if the word "subsidy" were a magic touchstone sufficient of itself to furnish relief. In both *Helvering* v. *Claiborne-Annapolis Ferry Co.,* 93 F. 2d 875 (C. C. A. 4th), and *Lykes Bros. S. S. Co.* v. *Commissioner,* 126 F. 2d 725 (C. C. A. 5th), the payments were treated as subsidies but were nevertheless included as taxable income.

The taxpayer further argues in this connection that (Br. 31–32) the payments may be construed to be gifts and, therefore, exempt under Section 22 (b) (3), *supra.* In view of the nature and purpose of the payments, it seems obvious that they do not fall in the category contemplated by Congress in the above exemption statute. The very theory of the legislation was that the Government and the farmer or rancher should cooperate in preventing soil erosion. The pertinent regulations, hereinafter discussed, made it very specific that the benefit payments were to be made only if earned. Designated payments were made at the end of each year upon a showing that the rancher had complied with established range-

improvement practices. In order to qualify for the benefit payments, the rancher was required not only to make certain positive improvements, but also to refrain from engaging in any range practice which would offset the benefits derived from the improvements. Clearly the rancher, in meeting these terms and conditions, furnishes sufficient consideration to take the payments out of the category of pure gifts. In *Allen* v. *Smith*, 173 U. S. 389, the court said (p. 402):

> Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized.

It seems equally clear that the benefit payments were not exempt from income tax as mere capital contributions, as the taxpayer argues. (Br. 15–30.) The payments were made primarily in recognition of active cooperation with the National Soil Erosion and Improvement Program and as a result of compliance by the taxpayer corporation with established range-improvement practices. The taxpayer (Br. 30) points to the fact that the improvement practices followed by it in the years now before the court, such as the construction or repair of reservoirs, dams, wells, and fences were all items of a capital nature. The suggestion is made that a distinction is justifiable, even if it be conceded that benefit payments based upon other types of improvement or compliance should be taxed. Such a suggestion ignores the

general nature and purpose of benefits payments. The Government was not making a contribution to capital as such. The payments were not directly commensurate with the work done or money spent in making a particular capital improvement. The lump sum allowance was paid to the respective ranchers, in an amount fixed by the acreage and livestock units involved, after a showing had been made that a minimum number of the prescribed range-improvement practices had been carried out, plus a showing that no offsetting bad practices had been followed. The basis of payment is well summarized in the following excerpt from the 1938-39 report of the Agricultural Adjustment Administration (p. 22):

> Under the range program, an allowance is established for each participating ranch. The allowance is determined on the basis of the number of animal units which the ranch is capable of carrying and the number of acres in the ranch. The rancher may earn this allowance by carrying out practices at rates of payment established for various range-improving practices included in the range conservation program.

The pertinent regulations[1] issued by the Secretary of Agriculture specifically provided that the rancher

[1] Federal Register, Tuesday, July 27, 1937, p. 1300:

1937 Agricultural Conservation Program—
Western Region
(WR Bulletin No. 101—Arizona—Supplement 2)

Part VI, Section 3, is amended to read as follows:

Section 3. *Payments Restricted to Effectuation of Purposes of the Program.*—No person shall be entitled to receive or retain any part of any payment if such person has adopted

must not only make specified improvements on the range, but must also refrain from following offsetting practices in order to qualify for the benefit payments. Let us suppose, for example, that after increasing the water supply and otherwise improving its range, the taxpayer here doubled the number of cattle and thus greatly enhanced its current income. It would, of course, be taxable on the income thus received. However, under the prohibition against offsetting bad range practices, it would forfeit its right to any benefit payments, since it would be guilty of violating the grazing capacity fixed by the regulations. Suppose, instead, that the taxpayer made the range improvements and continued to follow the recommended range practices so as to qualify for the benefit payments. In a practical sense, these payments make up or supplement the operating income which might otherwise have been realized, much the same as the Government payments supplemented the operating income of the railroad in *Texas & Pacific Ry. Co.* v. *United States,* 286 U. S. 285.

Throughout the pertinent regulations and reports dealing with the administration of this program, the payments are spoken of as being "earned". The 1936

---

any practices which the Secretary determines tends to defeat any of the purposes of the 1937 Program, or if such person has offset, or through any schemes or devices whatsoever, such as but not limited to operating by or through or participating in the operation of a firm, partnership, association, corporation, estate, or trust, has participated in offsetting, or has benefited or is in position to benefit by such offsetting, in whole or in part, the performance rendered in respect of which such payment would otherwise be made.

report of the Agricultural Adjustment Administration made this analysis (pp. 42, 52):

> In 1936 the Agricultural Adjustment Administration made studies and held hearings in developing a program to help ranchers work out better grazing methods for the range land under their control. * * *
>
> This program provided that ranchers could earn payments by adopting a wide variety of range-building practices, if the practices were approved by the county committee and a competent ranch examiner; and provided that the total payments earned on any ranch should not exceed $2 per animal unit on its established grazing capacity.
>
> * * * * *
>
> The 1937 program for range lands in the livestock grazing regions of the West and Southwest, is similar to the 1936 program, except that the maximum range-building allowance which can be earned for a given ranch is limited to $1.50 per animal unit of the normal carrying capacity of the ranch; * * *

It seems clear that the payments were not gifts or contributions to capital in the technical tax sense, but were in consideration of compliance with a prescribed course of conduct. The compliance consumed capital and labor. The payment here in question flows from such use of capital and labor and meets the general definition of income in *Eisner* v *Macomber, supra.* Other income will also result from such combined use of capital and labor, in the form of increased production or yield of livestock which will

presumably result from the improved practices.[2] Both kinds of income must be returned by the taxpayer. Offsetting this combined income will be the

[2] 1938 report of Agricultural Adjustment Administration (pp. 24, 36) :

> An important byproduct of the range conservation program is the opportunity it gives range operators to learn the value of practices which they otherwise would have to postpone or not do at all. * * *
>
> * * * * *
>
> In many range areas where drought has been severe, the range program has played an important part in enabling ranchers to retain their livestock. Under similar weather conditions in 1934, many of the same ranchers were forced to sell and ship their breeding stock because of lack of feed and water.

1939 report of Agricultural Adjustment Administration (pp. 6, 14) :

> In the western range country, ranchmen cooperating in the range conservation program have restored and protected range forage through range-building practices. In the early years, the program emphasized better distribution of livestock and more uniform utilization of range forage. More recently there have been large increases in natural and artificial reseeding practices and measures for promoting water conservation and run-off control.
>
> From the beginning, the program has pointed more and more at the conservation problems of the individual ranches. The program has made it possible for many range operators to develop plans of operation that make for more conservation, improvement, and increased efficiency of each ranching unit.
>
> * * * * *
>
> Thus, a combined total of $709,053,000 was added to the cash income of the Nation's farmers for their 1939 adjustment efforts. In qualifying for this cash aid, farmers also were storing in their soil the accruing benefits of a conservation system of farming.

usual depreciation allowances with respect to such of the practices as may constitute capital improvements. Smaller items of a current nature are, of course, compensated for by annual deduction of expenses.

It is interesting to note in this connection that in computing the level of farm income, the Department of Agriculture usually consolidates the benefit payments with the farmer's other income. The 1937 Report of the Secretary of Agriculture makes this statement (p. 44):

> Cash farm income, including Government payments for soil conservation, is likely to amount to nearly $9,000,000,000, or about 87 percent of the average for the predepression period 1924-29. With Government payments left out of the reckoning the income would be about 82 percent of the predepression average.
>
> This income will have a buying power equal to that of the predepression years. Prices of the goods and services that farmers commonly buy were about 14 percent lower in 1937 than they were in the period 1924–29. Hence, $9,000,000,000 cash income in 1937 would have about the same purchasing power as $10,000,000,000 in 1924 to 1929.

A more detailed statement of this period is made in the 1937 report of the Agricultural Adjustment Administration (p. 50):

> Soil conservation payments disbursed in 1937 contributed approximately $367,000,000, or more than 4 percent of the total farm cash income for that year. A large portion of the payments disbursed during 1937 was earned

> by compliance with the program of 1936, and a large portion of payments earned in 1937 was disbursed in 1938 and consequently was not included in 1937 cash income.

Note that the above excerpts speak of the benefit payments as constituting a certain percentage of the "total farm cash income", which were "earned by compliance with the program". In a recent press release, it was stated that "cash farm income, including Government benefit payments, is estimated at $15,600,000,000 for 1942". It is inconceivable that a considerable portion of this huge amount, representing benefit payments, should be treated as exempt from income tax.

The taxpayer predicates its case almost entirely upon *Edwards* v. *Cuba Railroad,* 268 U. S. 628. (Br. 15–28.) The facts of that case are unique and the rule there announced has been sparingly applied. During the years 1911 to 1916, the Republic of Cuba turned over to the railroad company large sums of money and considerable physical properties such as lands, buildings, and equipment which the Republic had acquired in an earlier effort to build the railroad. Specific concessions were made to the Republic of Cuba with respect to the future use of the railroad. No attempt was made to include the value of the physical properties as income. Under the circumstances, the court ruled that the cash payments could not be treated as income. The court pointed out that the funds were to be used directly to complete the building of the railroad and that the arrangement

indicated a purpose on the part of the Republic of Cuba to contribute to the taxpayer's capital, rather than to pay it for services rendered. The decision has been severely criticized,[3] and the Supreme Court itself has restricted its applicability. In *Texas & Pacific Ry. Co.* v. *United States,* 286 U. S. 285, the court distinguished its *Cuba Railroad* decision and ruled that a payment made by the Federal Government to the railroad to supplement operating income for the period following relinquishment of federal

[3] See Magill, Taxable Income (1936), 340–342; Rottschaefer, Concept of Income in Federal Taxation, 13 Minn. L. Rev. 637, 669. The latter author had this to say in criticizing the *Cuba Railroad* decision (p. 669):

> The reasons assigned were that they were intended to reimburse the company for its capital outlay, and that nothing indicated that they were to be used for dividends, interest or anything else properly chargeable against earnings. It may be quite true that the payments were intended to reimburse the company for its capital outlay, but the fact remains that at the close of the transaction the company still owned that capital and had the subsidy in addition. Presumably the company would in future years charge rates sufficient to take care through depreciation charges to be again reimbursed for its capital so far as others used it, and that its own net income for tax and other purposes would reflect those facts. The result would be that it would be allowed to convert tax free an amount of capital in excess of that contributed by itself, that is, in excess of the cost to it of that capital or of the March 1, 1913, value of its own capital contribution. This result, which amounts to a double reimbursement for its capital outlay, would have been avoided by treating the subsidies as income either in the years of their receipt or in some or all of the years of future operation. The only other way to avoid it would be to restrict future depreciation charges so as to prevent the recovery through rates of more than the cost or value of its own capital contribution.

control was taxable income. See also in this connection *Helvering* v. *Claiborne-Annapolis Ferry Co.*, 93 F. 2d. 875 (C. A. A. 4th), and *Lykes Bros. S. S. Co.* v. *Commissioner,* 126 F. 2d 725 (C. A. A. 5th). In the case last cited above, a similar argument was made and rejected by the court. The taxpayer there sought to avoid tax on a part of the Government payment because it was, indirectly at least, required to be used for capital purposes. The court there concluded that, while the taxpayer was bound to make certain capital improvements, the payment in question was not earmarked for that purpose, but was paid to the taxpayer in consideration of the performance of certain prescribed operations during each year. So, in the case at bar, the benefit payments were made to the taxpayer at the end of each year in consideration of its compliance with certain established practices and, irrespective of bookkeeping entries of the taxpayer, the payments were in fact income which could be used by the taxpayer for whatever purpose it saw fit.

The development of our income tax law indicates that "taxable income" is not a term that can be successfully defined so as to be binding for all time. The law of income taxation is dynamic, not static. "It is constantly developing, constantly changing, to meet the changes in our economic and political life." 1 Mertens, Law of Federal Income Taxation (1942) 161. Cf. *Helvering* v. *Producers Corp.,* 303 U. S. 376, with earlier Supreme Court decisions on that subject. We respectfully submit that the Board of Tax Appeals

correctly treated the benefit payments as taxable income.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

JANUARY, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943